Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

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MAHER W. SOLIMAN
Petitioner,

v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.
Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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PETITIONER IN PROPRIA PERSONA
April 28th, 2003

47 pp

## QUESTIONS PRESENTED

1. Whether plaintiff who alleges injuries caused by defendants' conduct: who may have deliberately manipulated the level of nicotine to sustain addiction in smoking, have systematically concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use, is barred by one-year statute of limitations pursuant to the provisions of CCP §340(3), that barrs untimely claims caused by defective product.

2. Whether plaintiff, who alleges injuries caused by defendants' conduct as referenced in question one, claims should have been governed by the Unfair Competition Law §17200 et seq. and the False Advertising Law §17500 et seq. and therefore the timeline is governed by §17208 that provides to four-year limitations period from the date of his discovery to defendants' conduct.

3. Whether the lower court erred in failing to recognize that at least two named defendants (Council for Tobacco Research-U.S.A., Inc., and Tobacco Institute, Inc.) are only trade associations and that these defendants do not manufacture, produce, sell or market any product.

4. Whether the decision conflicts with the United States Supreme Court in the case of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and the California Supreme Court in the case of *Mangini v. R.J. Reynolds Tobacco Co.*

(1994) 7 Cal.4th 1057, 1066.

5. Whether the present case involves a fundamental constitutional issue that is protected by the Seventh Amendment of the United States Constitution.

## PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption.

## RULE 29.4(C) CERTIFICATION

Petitioner certifies that 28 U.S.C. 2403(B) may apply and that this Petition has been served upon the Attorney General of California.

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(5) ORDER DISMISSING DEFENDANT PHILIP MORRIS COMPANIES FOR LACK OF PERSONAL JURISDICTION. Filed November 15, 2000;

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Maher W. Soliman, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of United States Court of Appeals for the Ninth Circuit (Pet. App. B) is published. The Judgment and Orders of the District Court for the Northern District of California dismissing the Complaint (Pet. App. F) are unpublished.

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied rehearing (Pet. App. A) on January 3rd, 2003. This Court has jurisdiction under 28 U.S.C. 1257(a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the U.S. Constitution, made applicable to the states preserves the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1913); *Parsons v. Bedford*, 28 U.S. (3 Pet. 433, 446-48 (1830). The Amendment has for its primary purpose the preservation of "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935); *Walker v. New Mexico & So. Pac. R.R.* 165 U.S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497-99 (1931); *Dimick v. Schiedt*, 293 U.S. 474, 476 , 485-86 (1935). The relevant provisions of California Law are produced in Article 6 Section 13 of the California

Constitution.

The relevant statutory provisions of California Law are: the Immunity Statute (former Section 1714.45); the Repeal Statute (current form of Section 1714.45); Comment *i* to Section 402A of the Restatement (Second) of Torts; California unfair competition law §17200 et seq. (Pet. App. K); and the false advertising law §17500 et seq. (Pet. App. K).

## I. STATEMENT OF THE CASE

Petitioner brought this suit against respondents based on their violations of California unfair trade practice and false advertising law. According to petitioner's complaint, defendants' actions that give rise to liability include the following:

-Defendants have known for many years that nicotine is addictive, but have publicly denied both the fact that nicotine is addictive and their knowledge of this fact, in order to conceal the addictive nature of cigarettes from the public, including Petitioner-Plaintiff;

-During the same time that Defendants have publicly denied the addictive nature of nicotine, Defendants have intentionally controlled the level of nicotine and other toxic substances they have sold, in order to preserve the dependence of smokers on cigarettes that Defendants sell. To this end, Defendants have utilized additives such as ammonia, as well as designs for which Defendants have sought patents, to make cigarettes, in effect, a "package" for the delivery of nicotine. Defendants have intentionally sought to increase the delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes, maintain the proper amount of nicotine in tobacco smoke, and delivery a pharmacologically active dose of nicotine to the smoker;

-During the same period of time, despite this voluntary and public undertaking to protect the public's "health as a basic responsibility paramount to every other consideration,"

Defendants have also intentionally avoided researching or developing cigarettes that would not cause dependence or addiction in those who use them;

-In their efforts to conceal the health hazards of smoking and the addictive nature of nicotine, Defendants have testified falsely under oath before the United States Congress, provided false explanations to customers and governmental agencies about the health hazards of tobacco and the harmful qualities of nicotine; concealed their secret research and testing on the dangers of cigarettes smoking and concealed their deliberate manipulation of the nicotine levels of cigarettes.

On or about January 26th, 2000, petitioner was diagnosed with smoking-related illness (Pet. App. J, FAC at ¶25.) On or about March 28th, 2000, petitioner brought this action against the defendants alleging that his injuries are caused by defendants' deceit and fraudulent conduct, and not by their product. (See also Pet. App. G)

## II. REASONS FOR GRANTING THE WRIT

### A. Reprehensibility of Defendants' Conduct (Pet. App. J, L)

The record fully supports finding that defendants knew by the late 1950's and early 1960's, that the nicotine in cigarettes is highly addictive, that substances in cigarettes tar cause lung cancer, and that no substantial medical or scientific doubt existed on this crucial fact. Nevertheless, motivated primarily by a professed desire to generate wealth, Philip Morris, in concert with other major tobacco companies, consistently endeavored through calculated misrepresentations to create doubts in the minds of smokers, especially addicted smokers such as plaintiff herein, that cigarettes are neither addictive, nor disease producing. In the language of a key internal document revealing the plan, Philip Morris and other tobacco companies set out to "create doubt about the health charge

without actually denying it." Pet. App. J, FAC at ¶144. (See also Pet. App. L)

The evidence supports a finding that in 1954, Philip Morris promised in a public announcement, run in over 400 newspapers nationwide, to pursue objective research into the health risks of smoking and to release the results for the benefit of consumers (See the "Frank Statement to Cigarette Smokers", Pet. App. I and Pet. App. J, FAC at ¶123). But, to the contrary, Philip Morris and other tobacco companies privately constrained research to produce results casting doubt on the alleged risks of smoking and went to extraordinary lengths to hide its own scientific information showing the company was fully aware of the true health dangers. One revealing memo written to the Company's top research scientists disclosed a practice of "burying" adverse internal research results ("[if the study proves nicotine is addictive] we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have."). Pet. App. J, FAC at ¶144. (See also Pet. App. L)

The record adequately demonstrates that Philip Morris and other tobacco companies publicly and falsely represented that: no proof existed that smoking causes cancer, knowing the opposite was true; that authorities have reached no agreement on what causes lung cancer, knowing the opposite was true; and that smoking is not addictive, knowing the opposite was true. While Philip Morris and other tobacco companies claim to have been relying on certain technical definitions of the language it used, the tobacco industry intended its publicly and widely disseminated words to be understood in a nontechnical sense, communicating a false impression that nicotine in cigarettes is not in fact addictive and that cigarette tars do not in fact cause cancer. Addiction by the layman was understood as a habit of addiction which is not an injury in itself, however, addiction as concealed by the tobacco industry was a harmful drug addiction which is severe injury. Such addiction was not known by the average layman of the community prior to 1998. (See also Pet. App. H)

Information, widely disseminated by tobacco industry provides that tobacco industry's doubt-creating scheme fully succeeded in the case of plaintiff herein and other similarly situated addicted to nicotine in cigarettes. This concerted effort to create doubt with misinformation was initiated long before the federal government enacted labeling statutes and was carried out for decades thereafter through the late 1990's. (See also Pet. App. H)

Substantial evidence supports a finding that tobacco industry was aware people who do not begin smoking in their adolescence are unlikely to become heavily addicted, life-long smokers. Philip Morris and other tobacco manufacturers focused its marketing on children, including the adolescent such as plaintiff herein in the 1960's, placing advertising where children were most likely to see it and crafting ads appealing to youthful passions for feelings of independence, identity and acceptance.

Circumstances surrounding the repeal of California Civil Code §1714.45 (enacted in 1987 and repealed in 1998) suggests some, if not a majority, of California's legislators in 1998 were deeply disturbed by revelations flowing from ongoing investigations of Philip Morris.

The allegations of the complaint fit a consistent pattern of deception. On this basis, the complaint asserts causes of action brought as a result to defendants' fraudulent conduct under California Unfair Trade Practice and False Advertising Law. The former creates a private right of action to remedy "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by" California's false advertising law. Cal. Bus. & Prof. Code 17200, 17203. The latter makes a criminal misdemeanor, and creates a private right of action to remedy, any statement "which is untrue or misleading" and is made or disseminated "before the public in this state **** in any newspaper or other publication *** or in any other manner or means whatever." *Id.* §§17500, 17535.

The legislature has enacted statutes that directly award damages against tobacco companies in product liability actions. The history of the statute which was

enacted was known as the "immunity statute".

## B. The Immunity Statute

Enacted as part of the Willie L. Brown, Jr. -- Bill Lockyer Civil Liability Reform Act of 1987, former Section 1714.45 (the Immunity Statute).

The following California decision interpreted the Immunity Statute.

### 1. American Tobacco Co. v. Superior Court

The state Court of Appeal's 1989 decision in *American Tobacco Co. v. Superior Court, supra,* 208 Cal.App.3d 480 (American Tobacco), which was authored by Presiding Justice J. Anthony Kline, was the first to construe the Immunity Statute. In that case, the court described the Immunity Statute as the result of a "'peace pact'" or "compromise between parties seeking and opposing comprehensive changes in California tort law who had been locked in a long political struggle that had reached a stalemate." (*American Tobacco, supra,* at pp. 486-487.) Those involved included major special interest groups such as insurers, physicians, manufacturers, and plaintiff's lawyers. (Id. at p. 486.) The Court of Appeal in *American Tobacco* characterized the Immunity Statute as so "poorly drafted" that "on its face[, it was] amenable to two diametrically opposed interpretations, each of which conflict[ed] in some way with the words" used by the Legislature. (*American Tobacco, supra,* at p. 485.) But legislative history, the court noted, indicated that the Immunity Statute's intent was to ensure that "'high-cholesterol foods, alcohol, and *cigarettes* that are *inherently unsafe and known to be unsafe by ordinary consumers,* [were] not to be subject to product liability lawsuits.'" (*American Tobacco, supra,* at p. 487, italics added.) In light of that legislative intent, the Court of Appeal in *American Tobacco* concluded that the statutory immunity was very broad, providing "nearly complete" immunity for manufacturers and sellers of tobacco and the other enumerated products. (*Ibid.*)

## C. THE REPEAL STATUTE

Ten years after enactment of the Immunity Statute, the California Legislature enacted the Repeal Statute, which amended former Section 1714.45, rescind the statutory immunity for tobacco companies as of January 1, 1998, when enacted the Repeal Statute provided, and with one major change still provides:

"(a) . . . .

"(1) . . . .

"(2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in comment *i* to Section 402A of the Restatement (Second) of Torts.

"(b) *This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions,* but does exempt the sale or distribution of tobacco products by any other person, including, but not limited to, retailers or distributors.

"(c) . . . .

"(d) . . . .

"(e) . . . .

"(f) *It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale or consumption of tobacco products.*

It is also the intention of the Legislature to clarify that such claims which were or are brought shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense.

"(g) . . . .

Through subdivisions (b) and (f), the Repeal Statute expressly rescinded the statutory immunity from product liability lawsuits for tobacco companies that the Legislature had allowed 10 years earlier. Although the Repeal Statute retained the Immunity Statute's reference to comment *i* Section 402A of the Restatement Second of Torts, negating liability to voluntary users of certain common but inherently unsafe consumer products, the Repeal Statute in subdivision (a) omitted tobacco products from specified "inherently unsafe" products.

**1. *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985 (A California Supreme Court Unanimous Decision)**

In *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal. 4th 985, the California Supreme Court explained "that suppliers of certain products which are 'inherently unsafe,' but which the public wishes to have available despite awareness of their dangers, should not be responsible in tort for resulting harm to those who voluntarily consumed the products despite such knowledge." (*Id.* at p. 1002.) The Supreme Court described the Immunity Statute as based on the principle that "if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user." (*Id.* at p. 999, italics omitted.) Thus, as applied to tobacco products, the Immunity Statute was intended to protect tobacco companies from liability for their conduct as manufacturers and sellers of products containing tobacco that is pure and unadulterated, when the claim seeks damages for personal injuries or death resulting from dangers or risks that are commonly known to be inherent to

tobacco products.

The Immunity Statute drew "its express inspiration from product liability principles addressed by Section 402A of the Restatement Second of Torts (Restatement), and particularly comment *i* thereto (Comment *i*)". *Richards, supra,* 14 Cal.4th at p. 999, citing former §1714.45, subd. (a)(2). The California Supreme Court observed: "Section 402A of the Restatement proposes generally that when a manufacturer or distributor sells a product 'in a defective condition unreasonably dangerous to the user or consumer' [citation]. and the product reaches that person, as expected and intended, without substantial change in its condition, the seller is 'subject to liability' for physical harm 'thereby caused to the ultimate user or consumer.'" (*Richards, supra,* at p. 999.)

The California Supreme Court went on to say in *Richards*: "However, comment i asserts an important qualification for the general rule.....Comment *i* makes clear that, under the Restatement formulation,'[t]he rule [of liability] applies only where the defective condition of the product makes it *unreasonably dangerous* to the user or consumer.' (Restatement, p. 352, italics added.) As comment *i* then explains, '[m]any products cannot possibly be made entirely safe for al consumption,' but if a product is *pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway,* does not expose the seller to liability for resulting harm to a voluntary user.

"Thus, comment *i* observes, '[o]rdinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture,' but this is not what the Restatement means by 'unreasonably dangerous.' 'Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics.....*Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful*.....Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks....' (Restatement, pp. 352-353, italics added.)" (*Richards, supra,* 14 Cal.4th at p. 999, some italics

added in first par.)

*Richards* added: "The clear premise of comment *i* is that no 'liability' arises under the circumstances therein described because *there is no sound basis for liability.* In other words, comment *i* posits, a manufacturer or seller *breaches no legal duty* to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers." (*Richards, supra,* 14 Cal.4th at p. 1000.)

Thus as the California Supreme Court explained in *Richards,* the Immunity Statute applied with respect to *"pure and unadulterated"* tobacco products (that is, products whose contents consumers *"desire[] to buy and ingest"*), notwithstanding that the *"inherent or unavoidable danger[s]"* of those products were *"commonly known to the community."* (*Richards, supra,* 14 Cal.4th ap pp. 999-1000, italics added.) Accordingly, the statutory immunity does not shield a tobacco company from product liability for injuries or deaths to consumers of its products caused by something not inherent in the product itself - that is, if some adulteration of the product made it unreasonably dangerous.

Plaintiff alleged in his First Amended Complaint (Pet. App. J), that defendants manipulated the addictive properties of cigarettes via additives and controlled nicotine delivery to smoker through adding ammonia (Pet. App. J at ¶¶¶210, 211 and 212.) The essence of these allegations is that defendant tobacco companies adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Because, as the California Supreme Court explained, the statutory immunity does not shield a tobacco company from liability for injuries or deaths caused by something not inherent in the product itself, the Immunity Statute does not bar these claims.
Indeed, as late as 1998, the Chief Executive Officer of Philip Morris (Geoffrey C. Bible) denied under oath, the addictive nature of nicotine and the harmful effect of smoking. (Pet. App. H)

Therefore, when, on January 1, 1998, the California

Legislature's repeal of that immunity took effect, the Legislature restored the common law principles that had, until enactment of the Immunity Statute, governed tort liability against tobacco companies in California. Thus, the Immunity Statute provides no protection to tobacco companies for their conduct. The Immunity Statue does not bar plaintiff's claims that the defendants adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Nor does the Immunity Statute shield tobacco companies from liability for conduct.

The California Supreme Court in *Khan v. Shiley*, 217 Cal. App.3d 848, 855-58, 266 Cal, Rptr. 106 (1990), the court stated:

Product liability is the name currently given to the area of law involving the liability of those who supply goods or products for the use of others to purchasers, users and bystanders for losses of various kinds resulting from so-called defects on those products. (Prosser & Keeton, Torts (5th ed. 1984 & sect95, p. 677.) Possible theories of recovery include strict liability in tort, negligence (i.e., in creating or failing to discover a flaw, in failing to warn or failing adequately to warn, or in the sale of defectively designed product) and breach of warranty (**express and implied**). **Allegations of fraud, however, are in a class by themselves**.....Unlike the other theories, in which the safety and efficacy of the product is assailed, **the fraud claim impugns Defendants' conduct.**

The California Legislature expressed intent to repeal the tobacco industry's immunity from personal injury suits provided in Civil Code Section 1714.45 (the "1998 Amendment") because:

"**Evidence has now become available** showing **tobacco companies may have deliberately manipulated the level of nicotine, a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers**.In addition, evidence shows the tobacco companies

have **systematically suppressed and concealed material information and waged an aggressive campaign of disinformation** about the health consequences of tobacco use."

Thus, **the very basis for the 1998 Amendment** by the Legislature is the recently available evidence concerning the cigarette industry's **past conduct.**

In enacting the (1998 Amendment) the California Legislature amended Civil Code Section 1714.45 and clearly expressed its intent that personal injury actions were to be allowed based on the cigarette industry's **past conduct.**

"(f) It is **the intention of the Legislature** in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session to **declare** that there exists **no statutory bar** to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also **the intention of the Legislature** to clarify that such claims which **were or are** brought shall be determined on their merits, without the imposition of any claim of **statutory bar** or categorical defense. Civ. C. §1714.45(f).

This plain language allowing claims by California smokers who "**have suffered or incurred** injuries, damages, or costs" which "**were or are** brought shall be determined on the merits without the imposition of any claim of **statutory bar.**

**D. California Laws Prohibiting Consumer Deception**

**1. The Unfair Competition Law (Pet. App. K)**

California's unfair competition law (UCL) (§17200 et seq.) defines "unfair competition" to mean and include "any unlawful, unfair or fraudulent business act or practice and

unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (17500 et seq..)]." (§17200.) The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110.)

The UCL's scope is broad. By defining unfair competition to include any "*unlawful*....business act or practice" (§17200, italics added), the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Here, for instance, the allegations contained in plaintiff's first amended complaint described defendants' reprehensible conduct and based on such conduct defendants violated the UCL by committing actual fraud as defined in and prohibited by Civil Code section 1572 and deceit as defined in and prohibited by Civil Code section s 1709 and 1710. By defining unfair competition to include also any "*unfair or fraudulent* business act or practice" (§17200, italics added), the UCL sweeps within its scope acts and practices not specifically proscribed by any other law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* at p. 180.) Plaintiff's first amended complaint also alleged a UCL violation of this type.

Not only public prosecutors, but also "any person acting for the interests of...the general public," may bring an action for relief under the UCL. (§17204.) Under this provision, a private plaintiff may bring a UCL action even when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565.) "This court has repeatedly recognized the importance of these private enforcement efforts." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126.)

In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are "generally limited to injunctive relief and restitution." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone*

*Co., supra*, 20 Cal.4th at p. 179; see §§17203, 17206; *ABC Internat, Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1268.) An order for restitution may require the defendant "to surrender all money obtained through an unfair business practice" including "all profits earned as a result of an unfair business practice." (*Krause v. Trinity Management Services, Inc., supra*, 23 Cal.4th at p. 127.)

**2. The False Advertising Law (Pet. App. K)**

California's false advertising law (§17500 et seq.) makes it "unlawful for any person,.....corporation....., or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services....or to induce the public to enter into any obligation relating thereto, to make or disseminate...before the public in this state, ....in any newspaper or other publication....or in any other manner or means whatever....any statement, concerning that real or personal property or those services...which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading...." (§17500.) Violation of this provision is a misdemeanor. (*Ibid.*) As with the UCL, an action for violation of the false advertising law may be brought either by a public prosecutor or by "any person acting for the interests of itself, its members or the general public," and the remedies available to a successful private plaintiff include restitution and injunctive relief. (§17535.)

**3. Common Feature of the UCL and the False Advertising Law**

The California Supreme Court has recognized that "[a]ny violation of the false advertising law....necessarily violates" the UCL. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210.) The California Supreme Court has also recognized that these laws prohibit "not only advertising which is false, but also advertising which[,] although true, is either actually

misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626.) Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, "it is necessary only to show that 'members of the public are likely to be deceived.'" (*Committee on Children's Television, Inc. v. General Foods Corp., supra*, 35 Cal.3d at p. 211; accord, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

**4. Petitioner's Claims are Governed by Business and Professions Code Section 17200 et seq. under the Unfair Competition Law and Section 17500 et seq. the False Advertising Law (Pet. App. K)**

Business and Professions Code Sections 17200, 17203 and 17204 authorize an action for unfair competition against a person or business that engages in false or misleading advertising. Business and Professions Code Sections 17500-17582 govern false or misleading advertising.

Business and Professions Code Section 17500 makes it unlawful for any person, firm, corporation, or association, or any employee thereof, to make or disseminate or cause to be made or disseminated, either to the public in California or from California to the public in any state, any statement concerning any circumstance or matter of fact connected with the proposed performance or disposition of the property or services, if the statement is (1) untrue or misleading, (2) is known, or by the exercise of reasonable care should be known, to be untrue or misleading, and (3) is made or disseminated or caused to be made or disseminated with intent directly or indirectly to dispose of the property, to perform the services, or to induce the public to enter into any obligation relating thereto. The prohibition extends to statements in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or ina any other manner or means whatsoever. Bus. & Prof. Code 17500.

In *City and county of San Francisco v. Philip Morris, Inc.*

(N.D. Cal. 1997) 957 F. Supp. 1130. 1140, the Court, in deciding an action brought by various counties against cigarette manufacturers, held that "**California law recognizes a distinction between claims based on fraudulent conduct and claims based on defects in a product.**" (Emphasis added.) The Court approvingly cited *Khan v. Shiley*[1] which recognized the distinction between fraud actions and actions based on smoking and health. Based on this distinction, the Court found that plaintiffs' **state law fraud and special duty claims were not barred by the former version of Civil Code Section 1714.45.** *City and County of San Francisco, supra,* 957 F. Supp. at 1140. No California appellate court has ruled otherwise.

It is also unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, (2) compare the product's effectiveness or safety to that of other brands or products, or (3) purport to be based on any fact. Bus. & Prof. Code §17508(a). A statement is untrue or misleading for purposes of Business and Professions Code Section 17500 if members of the public are **likely** to be deceived. Actual deception or confusion is not required. Therefore, a violation of the statute is actionable without individualized proof of deception, reliance, and injury. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197.

The prohibition in Business and Professions Code Section 17500 against false or misleading advertising extends to negligent, as well as to intentional, dissemination of such advertising. *People v. Forest E. Olson, Inc.* (1982) 137

[1] The Court of Appeal recognized this distinction between a product-liability claim and a fraud claim in *Khan v. Shiley.* The plaintiffs artificial heart valve (manufactured by the defendant) had a "propensity to fracture" but had not yet fractured or otherwise malfunctioned. *Id.* at p. 851. The plaintiff claimed emotional distress from knowing that her valve might malfunction. Although the court held that the plaintiff had no product-liability claim because the product had not yet caused her damage, the court recognized her viable fraud claim for injuries caused by the defendant's conduct. *Id.* at p. 857. Hence, even though the product was not defective, the defendant could be liable for defrauding the plaintiff into using the product to her detriment.

Cal.App.3d 137. The statute establishes a duty of reasonable care that is not satisfied by unquestioning reliance on representations made by others. The duty of care is breached by a failure to verify and investigate representations when facts are present that would put a reasonable person on notice that the representations are possible false. *Id.*

Business and Professions Code Section 17535 provides that an action for an injunction may be brought by any person acting for the interests of itself, its members, or the general public. A "person" for the purposes of the statute includes any individual, partnership, firm, association, or corporation. Bus. & Prof. §17506. Any person, corporation, firm, partnership, joint stock company, or any other association or organization that violates or proposes to violate the false advertising statutes may be enjoined by any court of competent jurisdiction. Bus. & Prof. Code §17535. **All that is needed to state a cause of action for injunctive relief is an allegation that members of the public are likely to be deceived.** Allegations of actual deception, reasonable reliance, and damages are not necessary. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197.

As further remedy for violation of the false advertising statutes, a court may make such orders or judgments as may be necessary to (1)prevent the use or employment of any practices that violate Business and Professions Code Section 17500 et. seq. or (2) restore to any person in interest any money or property acquired by unlawful practices. Bus. & Prof. Code §17535. The court is authorized to award restitution without individualized proof of deception, reliance, and injury if it determines that such a remedy is necessary to prevent the use or employment of the unfair advertising practices. *Committee on Children's Television, Inc. v. General Foods Corp,.* (1983) 35 Cal.3d 197.

In *Committee on Children's Television , Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 a group of plaintiffs filed a complaint charging a cereal manufacturer, a retailer, and two advertising agencies with fraudulent, misleading and deceptive advertising in the marketing of sugared breakfast

cereals. The complaint contained causes of action based on two consumer protection statutes (Bus. & Prof. Code §17200 et seq., unfair competition; and Bus. & Prof. Code §17500 et seq., unfair advertising). Defendant's demurrer was sustained without leave to amend by the trial court.

The California Supreme Court reversed and remanded for further proceedings, holding that the complaints stated a cause of action for injunctive relief and restitution under the unfair competition law and the false advertising law. The California Supreme Court stated:

"Plaintiff's second cause of action is based on Business and Professions Code Section 17500 and subsequent sections (the false advertising law), which prohibits the dissemination in any advertising media of any 'statement' concerning real or personal property offered for sale, 'which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.' Bus. & Prof. Code, §17500. Section 17535 authorizes injunctive relief and restitution...Any violation of the false advertising law, moreover, necessarily violates the unfair competition law.

"To state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.' (citations omitted.) Allegations of actual deception, reasonable reliance, and damages are unnecessary. The court may also order restitution without individualized proof of deception, reliance, and injury if it 'determines that such a remedy is necessary 'to prevent the use or employment' of the unfair practice....."

".....Defendants engaged in a nationwide, long-term advertising campaign **designed to persuade children** to influence their parents to buy sugared cereals. Adapted to its audience, the campaign sought to persuade less by direct representation than by imagery and example. While maintaining a constant theme, the particular advertisements changed frequently. Plaintiffs now contend that these

advertisements were deceptive and misleading, and while we do not know the actual truth of those charges, we must assume them true for the purpose of this appeal.....

".....The California Legislature....has enacted consumer protection statutes and codified common law remedies which in principle apply to all deceptive advertising, regardless of complexity and scale.....

"We therefore conclude that plaintiffs' complaint states a cause of actin for injunctive relief and restitution under the unfair competition law (Bus. & Prof. Code §17200 et seq.) and the false advertising law (Bus. & Prof. Code §17500 et seq.)....." *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210-23.

As in *Committee on Children's Television, supra,* Plaintiff's complaint properly states a cause of action based on Business and Professions Code Section 17500 and subsequent sections (the false advertising law), which prohibits the dissemination in any advertising media of any "statement" concerning real or personal property offered for sale, "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Bus. & Prof. Code, §17500. Plaintiff's complaint requests Equity relief and restitution as authorized by Section 17535.

Plaintiffs complaint alleges that defendants participated in a long-term advertising campaign **designed to persuade children** to purchase cigarettes and that these advertisements were deceptive and misleading. This false and unlawful advertising concealed the true facts concerning the health hazards of smoking, the addictive nature of nicotine, and the cigarette manufacturers' manipulation of the levels of nicotine in cigarettes so as to create and sustain addiction in smokers, including minors.

**5. Business and Professions Code Section 17208 Governs the Timeline for Statute of Limitations of Plaintiff's Claims**

The Unfair Competition Law applied to all deceptive advertising, regardless of complexity and scale. Therefore, plaintiff's complaint states causes of action under the Unfair Competition Law (Bus. & Prof. Code §17200 et seq.) and the false advertising law (Bus. & Prof. Code 17500 et seq.)

An action to enforce any cause of action under the Business & Professions Code, Section 17200 et seq. must be **commenced within four years after the cause of action accrued.** Bus. & Prof. Code §17208.

In *Suh v. Yang* (N.D. Cal. 1997) 987 F. Supp. 783 the Court held that competitor's wrongful dilution of a martial arts school operator's service name represented multiple, continuous acts that delayed **the accrual of the four-year limitations period applicable to the operator's unfair competition claim under Business and Professions Code Section 17208.** The court also noted that the "doctrine of equitable tolling" suspends the running of the statute of limitations if the plaintiff proves that the defendant fraudulently concealed the existence of the cause of action so that the plaintiff acting as a reasonable person, did not know of its existence.

".....Plaintiff's claim for unfair competition **would not be barred by the four year statute of limitations** since the alleged wrongs.....are multiple, continuous acts, and some of these acts have occurred within the limitations period.... *Suh v. Yang* (N.D. Cal. 1997) 987 F. Supp. 783, 95-796.

Here, as in *Suh v. Yang, supra,* clearly Plaintiff's causes of action are under the unfair competition law (Bus. & Prof. Code §17200 et seq.) and **the Statute of Limitations on his causes of action are four years triggered on or about October 15th, 2000** when it was revealed by Jeffrey Wigand on MSNBC. (Pet. App. J, FAC at ¶27.)

**E. Plaintiff's Claims are Brought as a Result to Defendants' Breach of Assumed Duty (Pet. App. I and J, FAC at ¶¶87, 89)**

In this case, plaintiff's First Amended Complaint

alleges that defendants' voluntarily assumed special duties by issuing the "Frank Statement to Cigarette Smokers":
"We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

"We always have and always will cooperate closely with those whose task it is to safeguard the public health."

"We are pledging aid and assistance to the research effort into all phases of tobacco use and health." Pet. App. I and J at 123, First Amended Complaint ¶123.

Later, defendants published "A Statement About Tobacco and Health":

"We recognize that we have a special responsibility to the public - to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use. We accepted this responsibility in 1954 by establishing the TIRC.....We shall continue all possible efforts to bring the facts to light." First Amended Complaint ¶131.

Defendants have re-affirmed these undertakings in various ways over the years. First Amended Complaint ¶¶132, 133, 134, 135, 136, 137.

**In making these commitments, defendants assumed duties to plaintiff and to the public in general.**

Defendants specifically pledged and undertook "a special responsibility to the public" and "accept[ed] an interest in people's health as..... paramount to every other consideration in [their] business." Id.

In accepting these responsibilities, defendants undertook three specific duties. First, by committing themselves to making the people's health their preeminent responsibility, the tobacco companies agreed that they would not sell or continue to sell products which they knew to cause death and disease when used as intended. The violation of this specially assumed duty is the direct cause

of Plaintiff's injuries (See FAC ¶¶87, 89). Second, defendants pledged to cooperate with those responsible for safeguarding the public's health. In fact, they did the opposite. Third, regardless of whether the tobacco companies had any duty to speak publicly on the subject, **having repeatedly undertaken to do so, they were legally bound to speak the full and complete truth.** *Bank of America v. Greenbach,* (1950), 98 Cal. App.3d at 232. Not only did defendants willfully fail to perform this duty, they actively conspired to conceal, suppress and distort the scientifically established facts that they knew.

Defendants reasonably should have foreseen the risk of harm that physical injury to cigarette smokers was not only foreseeable, it was contemplated as the inevitable consequence of a breach of defendants' undertakings. With regard to physical addiction, such injury was intended as defendants manipulated and tampered the nicotine in cigarettes to sustain addiction. **The injuries suffered by plaintiff are closely connected with defendants' conduct.** Defendants' conduct is morally reprehensible. **The tobacco defendants undertook a duty to protect the public's health by supporting independent research into the safety of tobacco disclosing the results of the research, and refraining from marketing products they knew would cause disease and death.** Meanwhile, defendants suppressed the results of research demonstrating that smoking caused death and disease and continued to sell products they knew caused death and disease, while at the same time altering their products to make them more addictive and halting the development of safer cigarettes.

**This action is for injuries caused by dishonesty and the failure to fulfill commitments. The injury alleged is not an invasion of the right to safe products, but an invasion of the rights to be dealt with honestly and to have commitments performed.** See *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992) (liability for fraud is based on a "general obligation - the duty not to deceive"). In short, the cause of the harm here was the defendants' conduct, not their products. [This point also holds true for the plaintiff's claims that the defendants breached their

specially assumed duty to make safety the companies' primary concern. Had defendants not undertaken such an obligation (and not committed the other misconduct alleged), section 1714.45 would protect them from liability for marketing products that were inherently unsafe. **Having publicly committed themselves to safety, however, and having acted to enhance the danger of their products, defendants invaded the public's and the plaintiffs interests in truthfulness. That legal injury was caused by conduct, not by products.]**

The distinction between claims based on dishonest conduct and claims based on defective products is well established in California law. In *Khan v. Shiley*, 217 Cal. App.3d 848, 855-58, 266 Cal. Rptr. 106 (1990), the court stated:

"Products liability is the name currently given to the area of law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products. (Prosser & Keeton, Torts (5th ed. 1984 &sect95, p. 677.) Possible theories of recovery include strict liability in tort , negligence (i.e., in creating or failing to discover a flaw, in failing to warn or failing adequately to warn, or in the sale of a defectively designed product) and breach of warranty (express and implied). Allegations of fraud, however, are in a class by themselves..... Unlike the other theories, in which the safety and efficacy of the product is assailed , the fraud claim impugns **defendants' conduct.**"

Based on this distinction, the court dismissed the plaintiff's claims for emotional distress based on product liability, but upheld claims based on fraud. *See also Westlye v. Look Sports*, 17Cal.App. 4th 1715, 1741-1750, 22 Cal. Rptr. 781 (1993) (classifying claims for products liability separately from claims based on misrepresentation); 6 Witkin, *supra*, Torts, & sect&sect674 *et seq.*, &sect&sect948 *et seq.*, &sect&sect1241 *et seq.* (addressing liability for fraud in Chapter VI, separate from discussion in Chapters VII and

IX of liability for defective products).

Similar reasoning underlies the Supreme Court's decision in *Cipollone v. Liggett Group, Inc. supra*, 505 U.S. 504. The plurality held that federal laws mandating warnings on cigarette packages did not preempt state laws permitting recovery for fraud and false advertising. The Court reasoned that the federal statutes only preempted local laws allowing actions "based on smoking and health," and that liability for fraud is predicated "on a more general obligation - the duty not to deceive." *Id.* at 528-29. Similarly, the court found no preemption of claims for a breach of express warranty, based as they were on a voluntary undertaking of the manufacturer. *Id.* at 525-26; *accord, Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1068, 31 Cal. Rptr. 2d 358 (1994) (federal law does not preempt California statute that protects minors from cigarette advertising.)

These results are consistent with section 1714.45(a)(2), which expressly refers to Comment i of Section 402A of the Restatement (Second) of Torts. **Comment i explains that a manufacturer escapes liability where the product is inherently unsafe, but is liable if the manufacturer's conduct adds to the danger of a product.**

Comment i states, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous." Here, defendants are alleged to have added to the danger of cigarettes by deliberately enhancing the addictive quality of nicotine. FAC ¶¶189-233. Thus, section 1714.45 does not protect defendants from liability caused by their altered product.

In fact, these exceptions confirm that the Legislature intended to protect inherently unsafe products, but did not intend to immunize misconduct by manufacturers. A breach of an express warranty is an affirmative misrepresentation about the product. A manufacturing defect is a mistake in the manufacturing process that adds to the product's danger. Yet both types of claims fall within the rubric of "product liability actions." *See, e.g. Barker v. Lull Engineering*, 20 Cal. 3d 413, 429, 143 Cal. Rptr. 225 (1978)

(manufacturing defect); *Westlye v. Look Sports, supra*, 17 Cal. App. 4th at 1748 (express warranty). Therefore, to exclude such misconduct from the reach of section 1714.45 required an express exception.

By contrast, while also involving misconduct, allegations of fraud ( or breach of an assumed duty) do not fall within the rubric of product liability; they "are in a class by themselves." *Khan*, 217 Cal. App.3d at 857. Therefore, there was no need to name fraud as an exception to section 1714.45's prohibition. In *City and County of San Francisco v. Philip Morris Inc.* (N.D. Cal. 1997) 957 F. Supp. 1130, 1140, the Court, in deciding an action brought by various counties against cigarette manufacturers, held that "**California law recognizes a distinction between claims based on fraudulent conduct and claims based on defects in a product.**" (Emphasis added.) The Court approvingly cited Khan v. Shiley, which recognized the distinction between fraud actions and actions based on smoking and health. Based on this distinction, the Court found that plaintiffs' **state law fraud and special duty claims were not barred by the former version of Civil Code Section 1714.45.** *City and County of San Francisco, supra*, 957 F. Supp. at 1140. No California appellate court has ruled otherwise.

**F. *Cipollone* is the Law in Cigarette Cases (*Cipollone v. Liggett Group, Inc.* 505 U.S. 504),**

Plaintiff's causes of action are all adequate and proper under *Cipollone* (*Cipollone v. Liggett Group, Inc.* 505 U.S. 504.) and none of the causes of action are barred or preempted as alleged in plaintiff's first amended complaint. Despite the confusion in the Federal and State Courts, one thing is very clear: Cipollone is the law on preemption in cigarette cases. Amplified and supported by the U.S. Supreme Court in *Medtronic, Inc. v. Lohr* (1996) 116 S. Ct. 2240. *Cipollone* holds:

"In our opinion, the preemptive scope of the 1965 act and the 1969 act is **governed entirely by the express language**

in §5 of each act...."

The Supreme Court discussed the test of express preemption, which is:

**"[Whether the legal duty that is the predicate of the common law damages action constitutes a requirement or prohibition based on smoking and health....imposed under State law with respect to.....advertising or promotion,** giving that clause a fair but narrow reading."

The Court specifically held that section 5(b) **does not generally preempt state-law obligations to avoid marketing cigarettes with manufacturing defects [strict liability] or to use a demonstrably safer alternative design for cigarettes.**

The Supreme Court also held that **express warranty claims are not barred or preempted:**

"As demonstrated above, however, **the 1969 act does not sweep so broadly: the appropriate inquiry is not whether a claim challenges the propriety" of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion.**

"A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirements" imposed by an express warranty claim are not imposed under state law," but rather **imposed by the warrantor.** n23 If, for example, a manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be imposed under state law, " but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular "requirement...based on smoking and

health....with respect to the advertising or promotion [of] cigarettes" in an express warranty claim arises from the manufacturer's statements in its advertisements. **In short, a common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement...imposed under State law" within the meaning of §5(b)."**

The Supreme Court also held that **claims for fraudulent misrepresentation of material fact, and for fraudulent nondisclosure or concealment, or any other state law proscriptions on intentional fraud are not barred or preempted.**

"Petitioner's second theory, as construed by the district court, alleges **intentional fraud and misrepresentation both by false representation of a material fact [and by] conceal[ment of] a material fact.** The predicate of this claim is a state law duty not to make false statements of material fact or to conceal such facts. Our preemption analysis requires us to determine whether such a duty is the sort of requirement or prohibition proscribed by §5(b).

**Section 5(b) preempts only the imposition of state law obligations with respect to the advertising or promotion" of cigarettes. Petitioner's claims that respondents concealed material facts are therefore not preempted insofar as those claims rely on a state law duty to disclose such facts through channels of communication other than advertising or promotion.** Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, §5(b) would not pre-empt a state law claim based on a failure to fulfill that obligation.

The Supreme Court made it very clear that fraudulent misrepresentation claims, <u>even those based on advertising</u>, are not barred or preempted:

"Moreover, **petitioner's fraudulent misrepresentation**

**claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by §5(b).** Such claims are not predicated on a duty based on smoking and health" but rather on a more general obligations -- the **duty not to deceive.** This understanding of fraud by intentional misstatement is appropriate for several reasons. First, in the 1969 act, congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud. To the contrary, the 1965 and the 1969 acts explicitly reserved the FTC's authority that the FTC had long exercised and continues to exercise. See §5(c) of the 1965 act; §7(b) of the 1969 act; see also nn. 7, 9, supra. **This indicates that congress intended the phrase relating to smoking and health" (which was essentially unchanged by the 1969 act) to be construed narrowly, so as not to proscribe the regulation of deceptive advertising."**

Therefore, plaintiff's fraudulent concealment claims and claims that the Cigarette Defendants misrepresented information and also suppressed information from the public, including plaintiff, are not barred or preempted. Finally, the Supreme Court also **approved of the conspiracy claim.**

"Petitioner's final claim alleges a **conspiracy** among respondents to misrepresent or conceal material facts concerning the health hazards of smoking. n28 The predicate duty underlying this claim is a duty not to conspire to commit fraud. For the reasons stated in our analysis of petitioner's intentional fraud claim, this duty **is not preempted by §5(b)** for it is not a prohibition base on smoking and health" as that phrase is properly construed. Accordingly, we conclude that the **1969 Act does not preempt petitioner's conspiracy claim."**

Clearly, under *Cipollone* the allegations contained in Plaintiff's conspiracy count are not preempted. See also, *Casano v. The American Tobacco Co., et al,* 870 F. Supp. 1425

(E.D. La. 1994) and *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995).

"The concealment allegations, insofar as they rely on **a state law duty to disclose material facts through channels of communication other than advertising and promotions,** do not involve an obligation with respect to those activities within Section 5(b)'s [the preemption section's] meaning."

"The "state law duty to disclose material facts through channels of communication other than advertising and promotions" arises through voluntary assumption of duty."

The law is well settled that one who undertakes to do something has a duty to do it non-negligently. See, e.g., *Williams v. State of California* (1983) 34 Cal.3d 18, 23. Cigarette Defendants, including Brown & Williamson, both prior to and after 1970 engaged in a consistent, intensive pattern of nonpromotional advocacy. The post-1970 advocacy statements of Cigarette Defendants and their industry fronts *create* a duty **because they constitute an "undertaking"**. One who undertakes to communicate with the public has a duty to do it non negligently. This principle applies even if the party has no duty to communicate in the first place.

*Cipollone* does not extend preemption to duties that arise *through the actions of the defendant*, rather than through state law alone. *Cipollone* stated that duties that are "undertaken" by the defendants are not considered preempted:

"[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement....imposed under State law" within the meaning of §5(b). 120 L. Ed. 2d 407, 428.

Cigarette Defendants' advocacy activities can also be seen as violations of the **"duty not to deceive" which is also not barred or preempted** under *Cipollone:*

"Moreover, petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by §5(b). Such claims are not predicated on a duty based on smoking and health" but rather on a more general obligation -- **the duty not to deceive**, 120 L. Ed. 2d 407, 430.

**G. Statute of Limitations is Primarily a Question of Fact Appropriate For Jury Consideration Pursuant to the Seventh Amendment of the United States Constitution**

The California Supreme Court stated that "resolution of the Statute of Limitations issue is normally a question of fact,...." *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d at p. 1112. The timeline and the question of Statute of Limitations is essentially fact-bound in nature, and thus it should be submitted to the jury for consideration.

That amendment applies not only to common-law causes of action but also to statutory causes of action analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard of courts of equity or admiralty. *E.g., Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 P. 17. The question whether the statute of limitations barrs plaintiff's complaint presents primarily a question of fact appropriate for jury consideration.

## III. CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Maher W. Soliman, JD
Petitioner in Propria Persona

Date: April 28th, 2003

NO. _____

==========

IN THE

Supreme Court of the United States

_____

MAHER W. SOLIMAN

Petitioner,

v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.

Respondents.

_____

**PROOF OF SERVICE**

I, MONICA VOGEL, do swear or declare that on this date, April 28th, 2003, as required by Supreme Court rules of Court, I have served three copies of the enclosed PETITION FOR WRIT OF CERTIORARI and APPENDIX on each party to the above proceeding or that party's counsel, and on every other person required to be served, by

depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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**Attorneys for Tobacco Institute, Inc**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 28th, 2003

_____

MONICA VOGEL

Supreme Court, U.S.
FILED

(2)

02 1633 Feb 25 2003

OFFICE OF THE CLERK

NO. _____

IN THE

Supreme Court of the United States

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MAHER W. SOLIMAN
Petitioner,

v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE
Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**APPENDIX - VOLUME I**

MAHER W. SOLIMAN, JD
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FILED BY: MAHER W. SOLIMAN,JD
PETITIONER IN PROPRIA PERSONA
April 28th, 2003

236 pp

## INDEX OF APPENDICES

APPENDIX A: ORDER (The Petition for Rehearing and rehearing en banc is DENIED.) Filed January 3, 2003.

APPENDIX B: OPINION (For Publication United States Court of Appeals for the Ninth Circuit.) Filed November 22, 2002.

APPENDIX C: ORDER (The case will be submitted on briefs and record, without oral argument on August 16, 2002, in San Francisco, California.) Filed July 30, 2002.

APPENDIX D: ORDER (As appellant has corrected the defects of the brief previously noted by the clerk, the motion to file a late opening brief and excerpts of record is granted.) Filed June 21, 2001.

APPENDIX E: ORDER (Appellees' motion to dismiss this appeal for lack of jurisdiction is denied.) Filed April 5, 2001.

APPENDIX F: (1) JUDGMENT IN A CIVIL CASE (United States District Court) Filed January 30, 2001;

(2) ORDER OF DISMISSAL FOR

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (B.A.T.) Filed March 14, 2001;

(3) ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (Lorillard Tobacco Company and Brown & Williamson Tobacco Corporation, successor by merger to the American Tobacco Company) Filed January 26, 2001;

(4) ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (Philip Morris Inc., R.J. Reynolds Tobacco Company, the Council for Tobacco Research - USA, Inc., The Tobacco Institute, and Liggett Group, Inc.) Filed November 15, 2000;

(5) ORDER DISMISSING DEFENDANT PHILIP MORRIS COMPANIES FOR LACK OF PERSONAL JURISDICTION. Filed November 15, 2000;

(6) ORDER. (Granting Dismissal with Leave to Amend to the First Eight

Causes of Actions and Granting Dismissal without Leave to Amend to Plaintiff's Ninth Cause of Action) Filed September 13, 2000; and

(7) ORDER DENYING PLAINTIFF'S MOTION FOR REMAND. Filed July 21, 2000.

APPENDIX G: APPELLANT'S PETITION FOR REHEARING EN BANC (FRAP 35) Filed with United States Court of Appeals for the Ninth Circuit on or about December 2, 2002.

APPENDIX H: Transcript of GEOFFREY C. BIBLE (C.E.O. of Philip Morris Companies) Witness Testimony on March 3, 1998, before Minnesota District Court, Second Judicial District, Ramsey County. It was made part of the record before the Ninth Circuit Court of Appeals and District Court.

APPENDIX I: A FRANK STATEMENT TO CIGARETTE SMOKERS (It was made part of the record before the Ninth Circuit Court of Appeals and District Court.

APPENDIX J: Plaintiff's FIRST AMENDED COMPLAINT FOR DAMAGES EQUITABLE RELIEF (Strict Liability, Negligence, Breach of Express Warranty, Breach of Implied Warranty, Fraud, Intentional Misrepresentation, Conspiracy to Commit Fraud and Misrepresentation, and Equitable Relief - Jury Trial Demanded) Filed with the District Court September 14, 2000.

APPENDIX K: RELEVANT STATUTORY PROVISION

APPENDIX L: REPORT OF SPECIAL MASTER: FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS REGARDING NON-LEGGETT PRIVILEGE CLAIMS. Filed with the District Court for the Second Judicial District, State of Minnesota, County of Ramsay on February 10, 1998. It was made part of the record before the Ninth Circuit and the District Court in this Case.

VOLUME I
APPENDIX A

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed JAN 03 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

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|---|---|
| MAHER W. SOLIMAN,<br><br>Plaintiff- Appellant,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES; R.J. REYNOLDS TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH USA INC.; TOBACCO INSTITUTE, INC.; LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORP.; B.A.T. INDUSTRIES P.L.C.; AMERICAN TOBACCO COMPANY; LIGGETT GROUP INCORPORATED,<br><br>Defendants - Appellees | No. 01-15387<br><br>D.C. No. CV-00-1530-MJJ<br><br>**ORDER** |

Before: HALL, KOZINSKI and MCKEOWN, Circuit Judges.

The petition for rehearing en banc is DENIED. Fed. R. App. P. 35, 40.

VOLUME I
APPENDIX B

FOR PUBLICATION

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

MAHER W. SOLIMAN,
*Plaintiff-Appellant,*

v.

PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES; R.J. REYNOLDS TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH USA INC.; TOBACCO INSTITUTE, INC.; LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORP.; B.A.T. INDUSTRIES P.L.C.; AMERICAN TOBACCO COMPANY; LIGGETT GROUP INCORPORATED,
*Defendants-Appellees.*

No. 01-15387
D.C. No.
CV-00-1530-MJJ
OPINION

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Submitted August 16, 2002*
San Francisco, California

Filed November 22, 2002

Before: Cynthia Holcomb Hall, Alex Kozinski and M. Margaret McKeown, Circuit Judges.

Opinion by Judge Kozinski

*The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

## SUMMARY

### Torts/Products Liability

The court of appeals affirmed a judgment of the district court. The court held that under California law, a longtime smoker who alleges addiction as an injury may not invoke the "discovery rule" exception to the statute of limitations for product liability claims based solely on the tobacco industry's alleged concealment of information about the harmful effects of smoking.

Appellant Maher Soliman had smoked cigarettes for 32 years, since the late 1960s, when he was 14. He had tried to quit 50 times, but never lasted more than three days. In October 1999, Soliman watched a television interview of a tobacco industry insider who revealed that the industry had suppressed information about the harmful effects of smoking. A few months later, in January 2000, Soliman was diagnosed with respiratory disorders that impaired his lung function and made it hard for him to breathe except in an upright position. Soliman then began to research the industry in earnest. He claimed that, in the course of this research, he made the discovery that smoking was addictive, and that he could not have discovered, prior to viewing the television interview, the addictive nature of nicotine in cigarettes and the health hazards of tobacco, because the tobacco industry had actively and fraudulently concealed and suppressed that information. Soliman sued appellees, various tobacco companies, in California state court in March 2000, seeking $100 million in general and compensatory damages, a further $100 million in punitive damages and equitable relief in the form of a fund to pay his future medical bills. He invoked a number of theories, including product liability, negligence, breach of warranty, fraud, misrepresentation, conspiracy and intentional infliction of emotional distress. The tobacco companies removed to federal court and, once there, moved to dismiss on the ground that the

suit was untimely. The district court denied Soliman's motion to remand to state court and dismissed the complaint as barred by limitations.

Soliman appealed.

[1] Product liability claims are subject to a one-year statute of limitations in California. This provision bars untimely personal injury claims based on defective products regardless of the particular legal theory invoked. The statute of limitations normally begins to run when the claim accrues, that is, when the cause of action is complete with all of its elements. When a plaintiff is unaware of his cause of action, the "discovery rule" may postpone accrual until he either discovers or has reason to discover it. A plaintiff has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements.

[2] Under California law, a plaintiff need not be aware of the specific facts necessary to establish the claim in order for a cause of action to accrue. Nor need he be aware of the particular legal theory that will support it. His claim accrues when, simply put, he at least suspects that someone has done something wrong to him. A smoker who is injured by a product he believed to be safe has reason at least to suspect that its manufacturer or seller has done something wrong. The statute of limitations began to run when Soliman should first have suspected that the tobacco companies' tobacco products had injured him, whether or not he knew of the tobacco companies' wrongful conduct.

[3] The relevant date for purposes of the statute of limitations was not when Soliman knew about the particular injuries that were diagnosed in January 2000, but when he should have known of any significant injury from the tobacco companies' wrongful conduct. [4] If Soliman had actual or constructive knowledge of his addiction before he was diagnosed with respiratory illness, the date of actual or constructive

knowledge of addiction would govern. [5] The date that Soliman actually discovered his addiction would be irrelevant if a reasonable person would have discovered it sooner.

[6] Under California law, addiction is a commonly known risk of smoking and is therefore a danger of which a plaintiff is presumed to be aware. [7] The final question was whether Soliman—presumed by California law to know that smoking causes addiction—had reason to suspect that he himself was addicted.

[8] Soliman knew he was a smoker. Under California law, he was presumed to know that smoking can cause addiction. Even if it were to be assumed that Soliman had no direct evidence of his addiction, he was charged with the obvious inferences he should have drawn about the consequences of his conduct. He may not have had a reason to know for sure that he was addicted until he tried to quit. But he at least should have suspected he had succumbed to that risk at some point during the 32 years that he smoked. A longtime smoker who alleges addiction as an injury may not invoke the discovery rule based solely on the industry's alleged concealment; nicotine's addictiveness is a matter of public record, and addiction is a predictable consequence of using an addictive product. Because Soliman was charged with this knowledge, the district court properly dismissed his complaint as barred by the statute of limitations. The judgment of the district court had to be affirmed.

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## COUNSEL

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Steven H. Bergman and Mary Elizabeth McGarry of Simpson Thatcher & Bartlett, Los Angeles, California, and New York, New York, for appellee B.A.T. Industries p.l.c.

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Sharon S. Mequet and Daniel J. Friedman of Loeb & Loeb LLP, Los Angeles, California, for appellee Council for Tobacco Research—U.S.A., Inc.

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## OPINION

KOZINSKI, Circuit Judge:

Christopher Columbus's log records the first European encounters with tobacco. His crew observed Indians "carrying a charred, hollow wood in their hands and herbs to smoke in this wood, which they are in a habit of doing."[1] Bartolemé de Las Casas, a contemporary who witnessed Columbus's return to Seville, described the consequences:

> These *muskets* as we will call them, they call *tabaco*. I knew Spaniards on this island of Española (San Domingo) who were accustomed to take it, and

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[1] *The Log of Christopher Columbus* 104 (Robert H. Fuson trans., 1987) (entry for Nov. 6, 1492).

> being reprimanded by telling them it was a vice, they made reply that they were unable to cease from using it.[2]

Five centuries later, the Surgeon General came to the same conclusion. In 1988, he formally classified nicotine as addictive, publishing a report whose title, *The Health Consequences of Smoking: Nicotine Addiction*, left little to the imagination.[3] FDA Commissioner David Kessler spent most of the 1990s trying to regulate tobacco products because of the threat that addiction posed to the public health. And, in the fall of 1994, Chandler was berated by Ross, Phoebe and the rest of the gang for his inability to quit.[4] In short, the addictive qualities of tobacco are a cultural fixture, and have been for quite some time.

Plaintiff Maher Soliman nevertheless claims he had no idea that cigarettes were addictive for the first thirty-two years that he smoked them. He says that he did not discover the truth until October 1999, when he saw a television interview of Jeffrey Wigand, the industry insider (so to speak) who made damaging revelations of nicotine manipulation by tobacco companies. Soliman sued the tobacco industry for making him an unwitting slave to the leaf, for demolishing his lungs and for causing him psychological distress. The district court dismissed because it found his claims were barred by the statute of limitations.

**1.** Soliman alleges that he has smoked cigarettes since the

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[2]Bartolemé de Las Casas, *Historia de las Indias* (1875) (manuscript compiled 1527-1561), *quoted as translated in* Charles Singer, *The Early History of Tobacco*, 219 Q. Rev. 125, 127 (1913).

[3]Public Health Serv., U.S. Dep't of Health & Human Servs., *The Health Consequences of Smoking: Nicotine Addiction* (1988) [hereinafter Surgeon General's Report].

[4]*See Friends: The One with the Thumb* (NBC television broadcast, Oct. 6, 1994).

late 1960s, when he was fourteen. He is by now addicted to nicotine. He's tried to quit fifty times, but has never lasted more than three days.[5] At the time he filed his complaint, he was only forty-six but had the lungs of an eighty-five year old. He suffers from a variety of respiratory disorders, including dyspnea and orthopnea, which impair his lung function and make it hard for him to breathe except in an upright position. He claims that smoking has afflicted him with "physical distress, depression, extreme anguish, nervousness, tension, anxiety and loss of sleep." Am. Compl. ¶ 25. And, still, he continues to smoke, unable to quit.

In October 1999, Soliman watched an MSNBC interview of Jeffrey Wigand, who revealed that the tobacco industry had suppressed information about the harmful effects of smoking. A few months later, he was diagnosed with the abovementioned respiratory disorders and began to research the industry in earnest. He claims that, in the course of this research, he made the discovery that's at the center of this lawsuit: Smoking is addictive. "Only then," claims Soliman, "did [he] discover that smoking was . . . an addiction and that he was and is addicted to tobacco product." Am. Compl. ¶ 26. He "could not have discovered, prior to the interview of Mr. Wigand on MSNBC, . . . the addictive nature of nicotine in cigarettes and the health hazards of tobacco, because the tobacco industry ha[d] actively and fraudulently concealed and suppressed" that information. *Id.* ¶ 27. Indeed, Soliman claims, "[t]he addictive nature of nicotine is a defect which is virtually impossible to identify and detect by the consumer." *Id.* ¶ 30.[6]

[5]Soliman's efforts at quitting apparently began only after he learned that tobacco was addictive from watching the Wigand interview in 1999. Why learning that tobacco was addictive suddenly made him want to quit, while years of warning labels disclosing the other serious health risks of smoking did not, is unclear. Nevertheless, on a motion to dismiss, we must assume the truth of these claims.

[6]*Cf. Barber* v. *McDonald's Corp.*, No. 23145/2002 (N.Y. Sup. Ct. filed July 24, 2002), http://news.findlaw.com/hdocs/docs/mcdonalds/barbermcds72302cmp.pdf (killer fries).

Soliman sued various tobacco companies in state court in March 2000, seeking $100 million in general and compensatory damages, a further $100 million in punitive damages and "equitable relief" in the form of a fund to pay his future medical bills. He invoked a number of theories, including product liability, negligence, breach of warranty, fraud, misrepresentation, conspiracy and intentional infliction of emotional distress. The thread running through his complaint is that cigarettes cause addiction and other health problems, and defendants must pay for inflicting these ailments upon him.

Defendants removed to federal court and, once there, moved to dismiss on the ground that the suit is untimely. Defendants are skeptical of Soliman's claim that, despite having smoked for thirty-two years, he didn't discover any of his health problems until a few months before he filed. They argue that Soliman had at least constructive knowledge much earlier.

The district court denied Soliman's motion to remand to state court and dismissed the complaint as barred by limitations. Soliman filed an amended complaint, but the district court held that the claims were still untimely and dismissed without leave to amend.

**2.** Soliman observes that the original removal notice was defective because it wasn't signed by all defendants. The district court, however, allowed defendants to cure this defect by amending the notice pursuant to 28 U.S.C. § 1653. "[A] procedural defect existing at the time of removal but cured prior to entry of judgment does not warrant reversal and remand of the matter to state court." *Parrino* v. *FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998).

Soliman also contends there is no complete diversity of citizenship as required by 28 U.S.C. § 1332. Soliman is a citizen of California. None of the named defendants is a citizen of that state, but the complaint lists several "Doe" defendants,

whose "capacities and relationship to other Defendants . . . are unknown" but who are, Soliman claims, "responsible for the acts complained of." Am. Compl. ¶ 14. In his appellate brief, Soliman for the first time identifies one of the mystery defendants—a company in Oakland, California, which he refers to as "DNA Plant Technology Corporation." Soliman claims that this firm genetically engineered a high-nicotine tobacco plant known as "Y-1" for Brown & Williamson, who grew it in Brazil and then secretly shipped it to the United States. He intends to substitute this newly identified co-conspirator for one of the Does.

The citizenship of fictitious defendants is disregarded for removal purposes and becomes relevant only if and when the plaintiff seeks leave to substitute a named defendant. 28 U.S.C. §§ 1441(a), 1447(e) (superseding *Bryant* v. *Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987) (en banc)). Soliman failed to do so before the district court entered judgment against him, and his post-judgment attempt has no jurisdictional significance. *See Bryant* v. *Ford Motor Co.*, 886 F.2d 1526, 1531 (9th Cir. 1989).

**3.** We therefore reach the central issue—whether Soliman's claims are timely. Because the district court dismissed the case on the pleadings, we can affirm only if untimeliness is apparent on the face of the liberally construed complaint. *See Pisciotta* v. *Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996).

**[1]** Product liability claims are subject to a one-year statute of limitations in California. Cal. Civ. Proc. Code § 340(3). This provision bars untimely personal injury claims based on defective products regardless of the particular legal theory invoked. *See Nodine* v. *Shiley Inc.*, 240 F.3d 1149, 1153 n.2 (9th Cir. 2001); *Clark* v. *Baxter Healthcare Corp.*, 83 Cal. App. 4th 1048, 1054 n.2 (2000). The statute of limitations normally begins to run when the claim accrues, that is, "when the cause of action is complete with all of its elements." *Nor-*

*gart* v. *Upjohn Co.*, 21 Cal. 4th 383, 397 (1999); 3 Witkin, *California Procedure* § 459 (4th ed. 1996). When a plaintiff is unaware of his cause of action, the "discovery rule" may postpone accrual until he either discovers or has reason to discover it. *Norgart*, 21 Cal. 4th at 397; 3 Witkin, *California Procedure*, *supra*, § 463. A plaintiff "has reason to discover the cause of action when he has reason at least *to suspect* a factual basis for its elements." *Norgart*, 21 Cal. 4th at 398 (emphasis added).

[2] Soliman argues that the statute of limitations didn't begin to run until he was aware, not only of his injuries, but also of defendants' specific wrongful conduct—in particular, their fraudulent concealment of the health hazards of smoking. But under California law, a plaintiff "need not be aware of the specific 'facts' necessary to establish the claim" in order for a cause of action to accrue. *Jolly* v. *Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111 (1988). Nor need he be aware of the particular legal theory that will support it. *Norgart*, 21 Cal. 4th at 397. His claim accrues "when, simply put, he at least 'suspects . . . that someone has done something wrong' to him." *Id.* (quoting *Jolly*, 44 Cal. 3d at 1110). A smoker who is injured by a product he believed to be safe has reason at least to suspect that its manufacturer or seller has done something wrong. *See Nicolo* v. *Philip Morris, Inc.*, 201 F.3d 29, 39 (1st Cir. 2000) ("[Plaintiff] knew her addiction was attributable to defendants. This alone put her on inquiry."); *Arnold* v. *R.J. Reynolds Tobacco Co.*, 956 F. Supp. 110, 117 (D.R.I. 1997) ("[O]nce a plaintiff is aware that he . . . has been injured by a product, [he] has enough information to commence a products liability action based on that injury."). The statute of limitations began to run when Soliman should first have suspected that defendants' tobacco products had injured him, whether or not he knew of defendants' wrongful conduct.[7]

[7]This is not a case like *Snow* v. *A.H. Robins Co.*, 165 Cal. App. 3d 120 (1985), where a plaintiff uses a product knowing that it has a predictable

[3] Soliman also argues that the statute of limitations didn't begin to run until he was diagnosed with dyspnea and orthopnea in January 2000. The relevant date, however, is not when Soliman knew about these particular injuries, but when he should have known of *any* significant injury from defendants' wrongful conduct:

> "[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date."

*Nodine*, 240 F.3d at 1153 (quoting *Spellis* v. *Lawn*, 200 Cal. App. 3d 1075, 1080-81 (1988)). "[I]f the statute of limitations bars an action based upon harm immediately caused by defendant's wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing" is normally barred. *Miller* v. *Lakeside Vill. Condo. Ass'n*, 1 Cal. App. 4th 1611, 1622 (1991); *see also* 3 Witkin, *California Procedure*, *supra*, § 545. "[A]lthough a right to recover nominal damages will not trigger the running of the period of limitation, the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period." *Davies* v. *Krasna*, 14 Cal. 3d 502, 514 (1975). Soliman alleges that he suffered a number of significant injuries from the cigarettes

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failure rate. In *Snow*, injury alone did not put the plaintiff on notice of wrongdoing because she knew that the product (an IUD) had a failure rate and reasonably inferred that she was one of the unlucky few. *See id.* at 134. Soliman, by contrast, claims that the tobacco industry assured him cigarettes were not addictive at all. He should have suspected wrongdoing as soon as he had actual or constructive knowledge of his addiction.

he smoked. The injury he should have known about first is the one that starts the statute of limitations.[8]

[4] Soliman alleged addiction as one of his distinct injuries. Am. Compl. ¶ 248. That might conceivably be a cognizable theory of recovery under California law. Tobacco addiction entails physical loss of control and—as any California restaurant-goer can attest—social ostracism. Some putative class actions have been premised entirely on the theory that addiction itself is an injury. *See, e.g.*, *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996) (noting "addiction as injury" as a "novel theor[y] of recovery"). We need not decide the matter here, however, because Soliman can't claim that his addiction is an appreciable injury and, at the same time, ask us to ignore it in determining when his claim accrued. If Soliman had actual or constructive knowledge of his addiction before he was diagnosed with respiratory illness, the date of actual or constructive knowledge of addiction would govern.

[5] Soliman's complaint doesn't state when in his thirty-two year smoking history he became addicted to nicotine; he contends only that he first "discover[ed]" his addiction while researching the tobacco industry after his January 2000 diagnosis. Am. Compl. ¶ 26. However, the date that Soliman actually discovered his addiction is irrelevant if a reasonable person would have discovered it sooner. *See Norgart*, 21 Cal. 4th at 398. Soliman's constructive knowledge of his own addiction depends to some extent on whether he should have known that smoking is addictive. He alleges that he didn't discover, and couldn't have discovered, the addictive qualities of nicotine before he saw the television program featuring Jeffrey Wigand in October 1999. But the dangers of nicotine addiction have been in the public spotlight for many years.

[8]The date of diagnosis would be irrelevant anyway if the physical symptoms of the disease had manifested themselves at some earlier date. *See Miller*, 1 Cal. App. 4th at 1624-25.

The Surgeon General concluded that nicotine is addictive in 1988, based on the "abundant scientific literature demonstrating that '[c]igarettes and other forms of tobacco are addicting.' " *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 154 (2000) (quoting Surgeon General's Report, *supra*, at 14). He determined that the " 'pharmacological and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.' " *Id.* (quoting Surgeon General's Report, *supra*, at 15). At congressional hearings in 1994, FDA Commissioner David Kessler testified at length about nicotine's addictive properties. *See Regulation of Tobacco Products (Part 1): Hearings Before the House Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, 103d Cong. 28-71 (1994). He noted that more than 15 million Americans try to quit each year and fail. *Id.* at 28. The FDA asserted jurisdiction over tobacco products in 1996 precisely because of their addictive effects. *See* Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619 (Aug. 28, 1996); *see also Brown & Williamson*, 529 U.S. at 125-26 (acknowledging that tobacco use is "one of the most troubling public health problems facing our Nation today," but holding that the FDA had exceeded its statutory authority). These are hardly obscure details in the historical record.

The California legislature acknowledged some time ago that the inherent risks of smoking are commonly known to the people of the state. In 1987, it enacted an immunity statute that shielded manufacturers and sellers of tobacco products from liability for the commonly known risks of smoking. *See* Act of Sept. 30, 1987, ch. 1498, § 3, 1987 Cal. Stat. 5777, 5778-79 (codified at Cal. Civ. Code § 1714.45), *repealed in relevant part by* Act of Sept. 29, 1997, ch. 570, 1997 Cal. Stat. 2838.[9] The California Supreme Court interpreted this

[9]Soliman argues that the immunity statute tolled the statute of limitations while it was in effect. We're skeptical but, at any rate, the California

statute in *Naegele* v. *R.J. Reynolds Tobacco Co.*, 28 Cal. 4th 856 (2002). The plaintiffs in that case alleged that the tobacco industry had "lied about the addictive nature of smoking," "disseminate[d] deceptive . . . statements about the . . . addictive nature of cigarettes," and "control[led] the nicotine content of their cigarettes." *Id.* at 865-66 (internal quotation marks omitted). The court held that the immunity statute barred these claims, reasoning that "[t]hese allegations do not suggest that the cigarettes plaintiff smoked exposed him to dangers other than those inherent in cigarette smoking" of which the public had a "general understanding." *Id.* at 866 (internal quotation marks omitted). The premise of the immunity statute was that "certain products . . . are 'inherently unsafe,' but . . . the public wishes to have [them] available despite awareness of their dangers." *Id.* at 862 (internal quotation marks omitted); *see also Barker* v. *Brown & Williamson Tobacco Corp.*, 88 Cal. App. 4th 42, 51 (2001) ("Regardless of any concealment by [tobacco companies], it has been a matter of common knowledge since at least 1965 that cigarette smoking is not healthy.").

[6] Under California law, addiction is a commonly known risk of smoking and is therefore a danger of which a plaintiff is presumed to be aware.[10] Because the immunity statute was

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legislature repealed the immunity statute effective January 1, 1998, and Soliman didn't file his complaint until 2000. Any tolling would have done nothing to help Soliman satisfy the one-year deadline. Cal. Civ. Proc. Code § 340(3).

[10]*Naegele* held that certain other risks of smoking, such as those resulting from adulteration of tobacco products with ammonia or other additives, are not inherent in the tobacco product itself and thus are not subject to the immunity statute. 28 Cal. 4th at 865. Soliman alleges that tobacco companies added ammonia to cigarettes, making them more addictive. Am. Compl. ¶¶ 210-211, 224-225. These allegations have no effect on when Soliman's cause of action accrued—the date he knew or should have known of his addiction. *See Norgart*, 21 Cal. 4th at 397; *Jolly*, 44 Cal. 3d at 1111.

repealed in relevant part in 1997, nicotine addiction claims are no longer categorically barred. *See* Act of Sept. 29, 1997, ch. 570, 1997 Cal. Stat. 2838. But they are still subject to limitations. For precisely the same reason a plaintiff couldn't avoid the immunity statute by claiming ignorance of the risk of nicotine addiction, *Naegele*, 28 Cal. 4th at 866, he can't now avoid the statute of limitations based on the same claim.

[7] A smoker may have a timely suit for addiction injury if he didn't become addicted until the year before filing suit. But that's not what Soliman claims; he says only that he didn't *discover* his addiction until recently.[11] The final question, therefore, is whether Soliman—presumed by California law to know that smoking causes addiction—had reason to suspect that he himself was addicted. *See Norgart*, 21 Cal. 4th at 398.

[8] The question answers itself. It's a syllogism that if you are aware that a certain activity carries a risk, and you engage in that activity, you may suffer the consequences of that risk. Replacing "are aware" with "should be aware" doesn't change the logic of this inference. Soliman knew he was a smoker. Under California law, he was presumed to know that smoking can cause addiction. Even if we assume that Soliman had no direct evidence of his addiction, he is charged with the obvious inferences he should have drawn about the consequences of his conduct. *See id.* (a cause of action accrues when the plaintiff "has reason to discover" it). He may not have had a reason to know *for sure* that he was addicted until he tried to quit. But he at least should have *suspected* he had succumbed to that risk at some point during the thirty-two years that he

[11]A plaintiff who doesn't allege that he was injured within the limitations period and instead invokes the discovery rule "concede[s] by implication that, without [the discovery rule], [his] claims are barred." *McKelvey* v. *Boeing N. Am., Inc.*, 74 Cal. App. 4th 151, 160 (1999). Unless Soliman is entitled to the discovery rule for his addiction injury, his complaint is untimely.

smoked. A longtime smoker who alleges addiction as an injury may not invoke the discovery rule based solely on the industry's alleged concealment; nicotine's addictiveness is a matter of public record, and addiction is a predictable consequence of using an addictive product.[12] Because Soliman is charged with this knowledge, the district court properly dismissed his complaint as barred by the statute of limitations.[13]

4. Soliman argues that, whether or not his other claims are untimely, his fraud claim is viable because defendants' fraudulent concealment is a "continuing wrong" that does not finally accrue until defendants disclose the things they are concealing. *See Page* v. *United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984); *Amador Valley Investors* v. *City of Livermore*, 43 Cal. App. 3d 483, 490 (1974). Soliman claims that defendants "still refuse to admit, and *continue* to conceal, the fact that smoking . . . causes disease and that nicotine . . . is addictive." Am. Compl. ¶ 53. That Soliman can make these allegations suggests that the industry's alleged deception is not terribly effective. In any event, even assuming that fraud may be a continuing tort in some circumstances, Soliman has failed to plead it here.

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[12]Because Soliman had constructive knowledge of his addiction more than a year before he filed suit, we need not address defendants' contention that his pleadings are not particular enough to invoke the discovery rule. *See Denholm* v. *Houghton Mifflin Co.*, 912 F.2d 357, 362 (9th Cir. 1990) ("Formal averments or general conclusions to the effect that the facts were not discovered until a stated date, and that the plaintiff could not reasonably have made an earlier discovery, are useless." (internal quotation marks omitted)).

[13] Soliman argues that his claim for equitable relief is governed by laches rather than by the statute of limitations. *See Conti* v. *Bd. of Civil Serv. Comm'rs*, 1 Cal. 3d 351, 359 (1969). But the relief that he seeks—payment of his medical bills—is legal, not equitable, so the doctrine of laches does not apply. *See Great-West Life & Annuity Ins. Co.* v. *Knudson*, 122 S. Ct. 708, 714 (2002) (" '[A] judgment imposing a merely personal liability upon the defendant to pay a sum of money' " is legal rather than equitable in nature. (quoting *Restatement of Restitution* § 160 cmt. a, at 641-42 (1936))).

A necessary element of a fraud claim is justifiable reliance on the defendant's misrepresentation or omission. *Lazar* v. *Superior Court*, 12 Cal. 4th 631, 638 (1996); 5 Witkin, *Summary of California Law* § 676 (9th ed. 1988). As we have already determined, California law presumes a plaintiff's awareness that smoking causes addiction and other health problems. *See pp. 13-15 supra*. Purported reliance on the industry's failure to disclose those facts is therefore not justifiable. Fraud that "should be apparent even to the plaintiff[ ]" is not actionable. 5 Witkin, *Summary of California Law*, *supra*, § 717; *see also Seeger* v. *Odell*, 18 Cal. 2d 409, 415 (1941) ("If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, . . . he will be denied a recovery."). This rule applies where, as here, "the law . . . assumes one will have . . . knowledge" of the true facts. *See Kahn* v. *Lischner*, 128 Cal. App. 2d 480, 487 (1954). Soliman was presumed to know the things he alleges were concealed from him. His complaint therefore cannot state a continuing fraud claim. *See Pearson* v. *Norton*, 230 Cal. App. 2d 1, 7-8 (1964) (absence of one element of a fraud claim is fatal).

* * *

In light of Soliman's previous failed attempt to amend his complaint, the district court did not abuse its discretion in denying further leave to amend. *See Ascon Props., Inc.* v. *Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). Soliman's suit was properly removed and then properly dismissed.

**AFFIRMED.**

VOLUME I
APPENDIX C

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed JUL 20 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

| | |
|---|---|
| MAHER W. SOLIMAN,<br><br>Plaintiff- Appellant,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES; R.J. REYNOLDS TOBACCO COMPANY; COUNCIL FOR TOBACCO RESEARCH USA INC.; TOBACCO INSTITUTE, INC.; LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORP.; B.A.T. INDUSTRIES P.L.C.; AMERICAN TOBACCO COMPANY; LIGGETT GROUP INCORPORATED,<br><br>Defendants - Appellees | No. 01-15387<br><br>D.C. No. CV-00-1530-MJJ<br><br>**ORDER** |

The case will be submitted on the briefs and record, without oral argument, on August 16, 2002, in San Francisco, California. Fed. R. App. P. 34(a)(2).

FOR THE COURT:

Cathy Catterson
Clerk of the Court

By: "s/_____"

Howard Hom
Deputy Clerk

VOLUME I
APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed JUN 21 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

| | |
|---|---|
| MAHER W. SOLIMAN, | ) |
| | ) No. 01-15387 |
| | ) |
| Plaintiff- Appellant, | ) D.C. No. |
| | ) CV-00-1530- |
| | ) MJJ |
| v. | ) Northern |
| | ) California |
| PHILIP MORRIS INCORPORATED, et al. | ) |
| | ) |
| | ) ORDER |
| Defendants - Appellees | ) |
| | ) |
| | ) |
| ---------- | ) |

As appellant has corrected the defects of the brief previously noted by the clerk, the motion to file a late opening brief and excerpts of record is granted. The brief and excerpts received June 19, 2001 shall be filed. The appendix shall be lodged.

The answering brief is due July 19,2001. The optional reply brief is due 14 days from service of the answering brief.

This order was issued prior to the expiration of time within which a response may be filed. Fed. R. App. P. 27(b).

FOR THE COURT:

Cathy Catterson
Clerk of the Court

By: "s/_____"

Cole Benson
Deputy Clerk
Ninth Cir. R. 27-7/
Appendix A,
General Orders for the
United States Court of
Appeals

pro 6.18

VOLUME I
APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed APR 5 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

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|---|---|
| MAHER W. SOLIMAN, | ) |
| | ) No. 01-15387 |
| | ) |
| Plaintiff- Appellant, | ) D.C. No. |
| | ) CV-00-1530- |
| | ) MJJ |
| v. | ) Northern |
| | ) California |
| PHILIP MORRIS INCORPORATED, et al. | ) |
| | ) |
| | ) ORDER |
| Defendants - Appellees | ) |
| | ) |
| | ) |
| ---------- | ) |

Before: Peter L. Shaw, Appellate Commissioner

Appellees' motion to dismiss this appeal for lack of jurisdiction is denied. *See Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980) (appeal survived absence of Rule 54(b) determination when remaining claims reduced to final judgment during pendency of appeal).

The briefing schedule established March 1, 2001 shall continue to govern this appeal.

"s/_____"
Peter L. Shaw
General Order 6.3(e)

VOLUME I
APPENDIX F

VOLUME I
APPENDIX F-1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Filed JAN 30 2001
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MAHER W. SOLIMAN, | ) |
| | ) Case Number: |
| | ) C00-1530MJJ |
| v. | ) |
| | ) |
| PHILIP MORRIS INC, et al. | ) JUDGMENT |
| | ) IN A CIVIL |
| | ) CASE |
| ---------- | ) |

IT IS ORDERED AND ADJUDGED
that the Court GRANTS Defendants' motion to dismiss Plaintiff's First Amended Complaint without leave to amend.

By: "s/_____"

Richard Wieking
Deputy Clerk

VOLUME I
APPENDIX F-2

Filed JAN 30 2001
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MAHER W. SOLIMAN,<br><br>Plaintiff,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED ("PHILIP MORRIS, U.S.A."); PHILIP MORRIS COMPANIES; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES P.L.C.; AMERICAN TOBACCO COMPANY; LIGGETT GROUP, INC.; COUNCIL FOR TOBACCO RESEARCH U.S.A., INC.; TOBACCO INSTITUTE, INC.; and DOES SIX through FIFTY, inclusive,<br><br>Defendants. | ) NO. C00-1530MJJ<br>) ORDER OF DISMISSAL |

Before the Court is Defendant B.A.T. Industries' ("B.A.T") motion to dismiss Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. Having considered the moving papers, the Court heard oral argument of counsel on March 13, 2001.

The Court finds, as it did in the ORDER OF

DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, issued on November 15, 2000, that Plaintiff failed to plead facts to show (1) the time and manner of discovery of his addiction injury or other smoking related injuries and (2) the inability to have made earlier discovery despite reasonable diligence which would have invoked the delayed discovery rule. Therefore, Plaintiff's causes of action based on any injury caused by smoking are barred by the one-year statute of limitations on personal injury actions. Furthermore, despite Plaintiff's attempt to craft an argument to equitably toll the statute of limitations based Defendant's alleged fraudulent concealment, the Court maintains its finding that all of Plaintiff's causes of action are time-barred.

Plaintiff relies on Khan v. Shiley, 217 Cal.App. 3d 848, 855-58 (1990), for the proposition that claims for fraud are distinct from those based on defective products. The statute of limitations for fraud is three years. See, Cal. Code Civil Proc. § 358 (d). The statute accrues upon the discovery, by the aggrieved party, of the facts constituting the fraud. See id. To prove fraudulent concealment, the plaintiff must prove (1) that the defendant fraudulently concealed the plaintiff's cause of action; (2) that the plaintiff did not discover the facts which form the basis of the claim; and (3) that the plaintiff exercised due diligence in attempting to discover the facts which form the basis of the claim. See French & Sons, Inc. v. General Portland, Inc. 885 F.2d 1392, 1399 (9th Cir. 1989).

Here, Plaintiff alleges that B.A.T. and Brown and Williamson became the focus of public controversy "in 1994, when internal documents, authored by both the parent and the subsidiary, were provided to the media and to Congress." (Opp. at 1:13-15.) Therefore, upon discovering the facts creating such public controversy in 1994, Plaintiff was on constructive notice of facts constituting the fraud allegedly committed by Defendant B.A.T. Contrary to Plaintiff's assertion, Defendants in this action are not charging Plaintiff with being on notice of what was transpiring in the decades prior to this public controversy in 1994. (See Opp. at 23:23-24.) Accordingly,

the statute of limitations for fraud began to run in 1994. Plaintiff did not file his Complaint until May 1, 2000.

Plaintiff relies on Castano v. The American Tobacco Co., 961 F. Supp. 953 (E.D. La. 1997), for the proposition that the exercise of reasonable diligence is a question of fact and not a question of law. In Castano, the court addressed when the affirmative defense of prescription under Louisiana law began to run, based on Louisiana case law[1]. Under Louisiana law, prescription does not begin to run against a plaintiff who is ignorant of facts upon which the claim as based as long as ignorance is not reasonable. See Castano, 961 F. Supp. at 957. Here, under California law, it is clear that Plaintiff must allege that he would have been unable to discover his claim despite the exercise of reasonable diligence in order to invoke the delayed discovery rule and toll the applicable statute of limitations. See McKelvey v. Boeing North America, Inc., 74 Cal. App. 4th 151 (1999). Under California law, Plaintiff bears the burden of showing diligence, and conclusory allegations are insufficient to invoke the delayed discovery rule. See McKelvey, 74 Cal. App. 4th at 160. Plaintiff fails to allege that he exercised reasonable diligence in discovering his claims. Therefore, the Court finds that Plaintiff knew, or should have suspected, in 1994 that the Defendant might have engaged in fraudulent conduct.

In French & Sons, Inc. v. General Portland, Inc., also relied on by Plaintiff, the court addressed whether the evidence relied on by the plaintiff to support his contention of fraudulent concealment was sufficient to raise a jury issue, and whether the evidence supported his contention that his failure to discover facts ad his diligence in attempting to discover such facts. See 885 F.2d at 1399. In French & Sons, the court found that the plaintiff had

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[1] Prescription is defined as, "[a] peremptory or perpetual bar to every species of action real or personal, when a creditor has been silent for a certain time without urging his claim." Black's Law Dictionary 1183 (6th ed. 1990), citing Jones v. Butler, 346 So. 2d 790, 791 (1977). Prescription appears to be the Civil Law analogue to the statute of limitation, with the policy based on "the general interest of parties in not being exposed to an action which, if well founded, should have been brought a long time before." Jones, 346 So. 2d at 792, quoting Civil Law Translations, Aubry & Rau Prescription, §771.

sought out the facts to support a potential claim. See id, at 1400. Here, as noted above, Plaintiff has made no allegations that he exercised reasonable diligence in discovering the facts necessary to support his potential claims. Plaintiff also relies on French & Sons for the proposition that the existence of similar claims in prior lawsuits is not tantamount to actual or constructive knowledge that, as a matter of law, a subsequent plaintiff has a viable cause of action. See id. However, Plaintiff is not charged with constructive knowledge of prior lawsuits; he is charged with constructive knowledge of public allegations of the addictive nature of nicotine, and the public controversy surrounding certain Defendant's conduct, which came to public light in 1994.

Finally, Plaintiff relies on Page v. United States, 729 F.2d 818, 821-22 (D.C. Cir. 1984), for the proposition that Defendant's conduct fits within the "continuing wrong" doctrine, whereby the statute of limitations is tolled until the wrongdoing cases. In Page, which involved a claim under the Federal Tort Claims Act, alleging that the Veterans Administration had wrongfully prescribed addictive drugs without proper monitoring over a time span of eight years, the court held that the cause of action did not accrue until the allegedly tortious conduct came to a halt. See, 729 F.2d at 823. The court in Page gave examples of conduct to which the continuing-tort doctrine has been applied.[2] Plaintiff has failed to support his conclusory assertion that Defendant's conduct fits within the ambit of this doctrine. Therefore, the Court finds that the statute of limitations were not tolled based on a continuing tort theory.

On August 29,2000, the Court found that Plaintiff had not pled the requisite discovery facts sufficient to invoke the "delayed discovery rule" under McKelvey v. Boeing North America, Inc., 74 Cal. App. 4th 151, 160

[2] See Page, 729 F.2d 818 at 822. The court noted that the following types of injuries fit within the ambit of the continuing-tort doctrine: (1) physical injury sustained by operation of a jackhammer over a period of 28 years did not accrue until employee was assigned too lighter duties; (2) an employee was allowed to recover for continued assignment to the injury producing post; (3) a prisoner could maintain an action after assault and battery for a continuing failure to provide medical attention.

(1999), therefore, the Court granted Plaintiff leave to file an amended complaint. The Court dismissed Plaintiff's First Amended Complaint on November 15, 2000, as to certain defendants in this action finding that Plaintiff failed to plead sufficient facts to overcome the statute of limitations bar, or that he exercised reasonable diligence in attempting to discover the addictive nature of nicotine, despite the Court's specific instructions. On January 26, 2001, the Court dismissed the complaint as to Lorillard Tobacco Company and Brown & Williamson Tobacco Corporation, successor by merger to the American Tobacco Company, for the same reasons. Plaintiff has again failed to allege that he exercised reasonable diligence in discovering his injury, or discovering the fraudulent conduct of Defendant B.A.T. The Court has given Plaintiff notice of the pleading requirements under the law and Plaintiff has repeatedly failed to comply with those requirements.

Plaintiff states the issue quite precisely with regard to his claim of fraudulent concealment, "[t]he question before the court is not when did the plaintiff know about the health risks; the question is when did the plaintiff know about the defendants' misconduct." (Opp. at 23:20-21.) On the face of Plaintiff's motion, he alleges that the controversy over the conduct of various members of the tobacco industry came to public light sometime in 1994. Having failed to allege that he exercised reasonable diligence in discovering this allegedly fraudulent conduct, the Court finds that all of Plaintiff's claims are barred by the applicable statute of limitations. Accordingly, the Court grants Defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

Dated: March 13, 2001

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-3

Filed JAN 26 2001
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MAHER W. SOLIMAN,<br><br>Plaintiff,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED, et. al,<br><br>Defendants. | NO. C00-1530MJJ<br><br>ORDER OF DISMISSAL |

On December 4, 2000, Defendants Lorillard Tobacco Company and Brown & Williamson Tobacco Corporation, successor by merger to the American Tobacco Company, filed a motion to dismiss Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. Having considered the moving papers, the Court heard oral argument of counsel on January 23, 2001.

The Court finds, as it did in the ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, issued on November 15, 2000, that Plaintiff failed to plead facts to show (1) the time and manner of discovery of his addiction injury or other smoking related injuries and (2) the inability to have made earlier discovery despite reasonable diligence which would have invoked the delayed discovery rule. Therefore, Plaintiff's causes of action are barred by the

one-year statute of limitations on personal injury actions.

Accordingly, the Court hereby GRANTS Defendants' motion to dismiss Plaintiff's First Amended Complaint without leave to amend.

IT IS SO ORDERED.

Dated: January 25, 2001

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-4

FILED 2000 NOV 15
PM 3:16
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NO. DIST. OF CA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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|---|---|
| MAHER W. SOLIMAN,<br><br>Plaintiff,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED, et. al,<br><br>Defendants. | ) NO. C00-1530MJJ<br>) ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED |

Defendant Philip Morris Incorporated's motion for dismissal (on behalf of defendants R.J. Reynolds Tobacco Company, the Council for Tobacco Research - U.S.A., Inc., The Tobacco Institute, and Liggett Group, Inc.), pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6), for failure to state a claim upon relief can be granted, was heard on November 7, 2000. The Court has read the moving and responding papers and heard the oral argument for counsel. For the reasons set forth below, the Court hereby GRANTS defendants' motion without leave to amend.

## I. BACKGROUND

Plaintiff Maher W. Soliman ("Plaintiff") complains of addiction to nicotine and several other conditions allegedly incurred by smoking cigarettes.Plaintiff is a forty-six years old male who has smoked for thirty-two years and has unsuccessfully tried to stop smoking over fifty times. Plaintiff experienced shortness of breath associated with chest pain "on or about January 20, 2000" and was diagnosed with smoking related illness "on or about January26, 2000," including "dyspnea" (an impairment to lung function), "orthopnea" (an inability to breath except in an upright position), premature lung aging, physical distress,depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep. Upon diagnosis, Plaintiff claims he began investigating the tobacco industry and then learned of the addictive nature of nicotine.

Plaintiff notes several public allegations of the addictive nature of nicotine, including a presentation by Dr. David A. Kessler to the Congressional Subcommittee on Health and the Environment "on or about March 25, 1994," testimony by Dr. Kessler before the Waxman Committee (also in 1994), and a December 1995 article in the Wall Street Journal. Plaintiff does not explain why he was unaware of these allegations prior to his diagnosis.

## II. LEGAL STANDARD

A court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for either lack of a congnizable legal theory or the pleading of insufficient facts under a cognizable legal theory. Robertson v. Dean Witter Reynolds Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). Where the facts and dates alleged in the complaint indicate the claim is barred by the statute of limitations, a motion to dismiss for failure to state a claim lies because the action is time-barred. Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980). When deciding upon a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to FRCP 12(b)(6), a court must take all of the material allegations in plaintiff's complaint as true, and construe them in the light most favorable to plaintiff. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

## III. ANALYSIS

A. The "delayed discovery rule"

Defendant Philip Morris Incorporated moves to dismiss for failure to state a claim pursuant to FRCP 12(b)(6) because Plaintiff failed to plead facts that would overcome the one-year statute of limitations bar for personal injury actions set forth in California Code of Civil Procedure ("CCP") §340(3). Under the "delayed discovery rule," a plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. McKelvey v. Boeing North American, Inc., 74 Cal. App. 4th 151, 160 (1999).

B. Time and manner of discovery

1. Addiction Injury

Plaintiff's first listed injury is "addiction to the chemical substance nicotine." Plaintiff makes conflicting allegations about when he discovered he was addicted to nicotine -- October 15, 1999 and January 26, 2000. Plaintiff claims such conflicts were made in "error" and tries to explain the "oversight" in his Opposition. This explanation is irrelevant insofar as it attempts to plead facts to support the use of the delayed discovery rule because the new allegations in opposition papers are irrelevant for Rule 12(b)(6) purposes. Schneider v. California Dept. of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1988).

Plaintiff relies primarily on the January 26, 2000 date of diagnosis of his addiction and impliedly claims that his addiction was undetectable until this date. However, Plaintiff has been a smoker for thirty-two years and has attempted to quit smoking on several occasions. He has admitted that he thought tobacco was habit-forming, which has been equated with knowing that tobacco was addictive. Insolia v. Philip Morris, Inc., 216 F.3d 596, 603 (7th Cir. 2000). The fact that Plaintiff fails to allege when he first discovered his inability to quit smoking and when he first discovered that tobacco was habit-forming indicates that he failed to meet the heightened McKlvey pleading requirements to invoke the delayed discovery rule

and overcome the statute of limitations bar on his addiction injury.

2. Plaintiff's Other Smoking-Related Injuries

Plaintiff's other 13 injuries include permanent shortness of breath, inability to breath except in the upright position, damage to his lungs, premature aging to his lungs, difficulty breathing, chest pain, physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep. Amended Complaint ¶24-25. Plaintiff claims he first suffered symptoms of shortness of breath "on or about January 20,2000." All of his injuries were allegedly diagnoses "on or about January 26th, 2000."

Plaintiff reliance on several cases discussing "latent injuries", such as cancer or the asbestos-related disease mesothelioma, to support his theory that the statute of limitations should not begin to run until the diagnosis of an injury is misplaced. Where an injury is not latent, like cancer or mesothelioma, the cause of action will generally accrue on the date that symptoms of the injury appear and not when there is a diagnosis. Goldrich v. Natural Y Surgical Specialties, Inc., 25 Cal. App. 4th 772, 781 (1994). (emphasis added.)

Plaintiff fails to allege when his symptoms first occurred with regard to his physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep. Plaintiff cannot rely on date of diagnosis because these are not "latent injuries", by the nature of the clinical diagnosis, Plaintiff must have suffered some outward manifestations prior to his diagnosis on January 26, 2000. Plaintiff fails to allege when such outward manifestations first occurred as required by McKelvey, therefore these injuries are time-barred. Plaintiff' s only allegation of when his symptoms first occurred was "on or about January 20, 2000" when he experienced "shortness of breath accompanied with chest pain when situated laying down." This Court has determined that this fails to meet the first prong of the heightened pleading requirement in McKelvey, therefore reliance on the delayed discovery was is unjustified.

3. No allegations of reasonable diligence

Furthermore, in a delayed discovery case, a plaintiff

must also plead facts sufficient to convince the court that delayed discovery was justified. April Enterprises, Inc. v. CTTV, 147 Cal. App. 3d 805, 832 (1983). Plaintiff here cites several authorities in 1994 and 1995 in his Amended Complaint without explaining why he was unaware of such publicity sooner. Plaintiff claims he was not put on notice to investigate the tobacco industry until he was diagnosed in January 2000, relying on the late availability of certain documents collected by Philip Morris and made public on the internet. Opposition , 3:24-12. This does not explain why he was unaware of the other public allegations of the addictive nature of nicotine cited in his Amended Complaint , including a December 1995 article in the Wall Street Journal. Plaintiff failed to specifically plead facts showing that he exercised reasonable diligence in attempting to discover of the addictive nature of nicotine and, therefore, has not met the second prong of the heightened pleading requirements of McKelvey. Plaintiff is not allowed to invoke the delayed discovery rule. The Court finds that all of plaintiff's causes of action based on his personal injuries are time-barred.

IV. ORDER

Plaintiff failed to plead facts to show (1) the time and manner of discovery of his addiction injury or other smoking related injuries and (2) the inability to have made earlier discovery despite reasonable diligence which would have involved the delayed discovery rule. Therefore, Plaintiff's causes of action, are barred by the one-year statute of limitations on personal injury actions. Based on the foregoing, the Court grants defendants' motion to dismiss for failure to state a claim upon which relief can be granted, without leave to amend.

IT IS SO ORDERED.

Dated: November 13, 2000

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-5

FILED 2000 NOV 15
PM 3:16
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NO. DIST. OF CA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MAHER W. SOLIMAN,<br><br>Plaintiff,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED, et. al,<br><br>Defendants. | ) NO. C00-1530MJJ<br>) ORDER DISMISSING DEFENDANT PHILIP MORRIS COMPANIES FOR LACK OF JURISDICTION |

Defendant Philip Morris Companies' motion for dismissal, pursuant to Federal Rule of Civil Procedure 12(b)(2), for lack of personal jurisdiction was heard on November 7, 2000. The Court has read the moving and responding papers and heard the oral argument of counsel. For the reasons set forth below, the Court hereby GRANTS defendant's motion.

## I. BACKGROUND

Defendant Philip Morris Company ("PMC") is a holding company, with wholly-owned corporate subsidiaries, including Philip Morris Incorporated ("PMI").

PMC does not manufacture, distribute or sell cigarettes or any other product, it does not conduct business in California, and it does not have an office or own property in the state.

## II. LEGAL STANDARD

Federal Rule of Civil Procedure ("FRCP") 12(b)(2) allows a defendant to challenge the Court's jurisdiction over the person. Fed. R. Civ. Pro. 12 (b)(2). Once the defendant has challenged the exercise of personal jurisdiction, the plaintiff has the burden of showing that the court has jurisdiction. KVOS, Inc. v. Associated Press, 299 U.S. 269, 278 (1936). Plaintiff failed to carry his burden of showing that this Court may exercise jurisdiction over Philip Morris Companies.

## III. ANALYSIS

A. Jurisdiction

A court in California may exercise personal jurisdiction over a non-resident defendant only where the jurisdictional allegations: (1) satisfy California's long-arm statute, and (2) establish that exercising personal jurisdiction over the defendant does not offend the due process clause of the Constitution of California or the United States Constitution. Cal. Code Civ. Proc. §410.10. The due process inquiry has two parts. First, the defendant must have "minimum contacts" with California. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Second, the exercise of jurisdiction must not offend "traditional notions of fair play and substantial justice." Id.

There are two types of jurisdiction that arise out of a party's "minimum contacts" with the forum - general and specific. General jurisdiction is applicable where defendant's activities in the forum state are "substantial" or "continuous and systematic," even if the cause of action is unrelated to those activities. Data Disc Inc. v. Systems Tech. Assoc., 557 F.2d 1289, 1287 (9th Cir. 1977). Specific jurisdiction is applicable if defendants activities in the forum give rise to, or are related to, the litigation. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

B. There is no basis on which the court may exercise

general jurisdiction over PMC

PMC is a holding company, owning all of the stock of PMI, and PMC does not produce any products or services. PMC is incorporated in Virginia and has its principal place of business in New York. PMC has no employees, offices, or property in California. PMC's only contact with California is in the form of bank accounts with minimal balances. These contacts are not "substantial" or "continuous and systematic" enough to warrant the exercise of general personal jurisdiction over PMC. The Court find that it may not exercise general personal jurisdiction over PMC.

C. There is no basis for the court to exercise specific jurisdiction over PMC

1. Purposeful Availment

Plaintiff asserts the PMC has "purposefully availed" itself of the laws of California based on general allegations about intentional misconduct of PMC and the "effects" of the alleged misconduct in California. However, courts have construed "purposeful availment" to encompass tortious activities that were expressly aimed or purposefully directed at the forum in more than a random, fortuitous, or attenuated way. ESAB Group Inc. v. Centricut, Inc. et al., 126 F.3d 617, 625 (4th Cir. 1997).

Plaintiff conclusory alleges that PMC is "primary participant" in "conducting research and development, designing cigarettes, concealing information on the health hazards of smoking and engaging in a conspiracy with other cigarette manufacturers.....knowing that this conduct would cause smoking-related injuries to smokers wherever Philip Morris cigarettes were sold." Opposition, 11:20-25. First, plaintiff's supporting documentation does not substantiate plaintiff's claims that PMC engaged in this conduct. Even if PMC did engage in this conduct, it was not expressly aimed at the State of California and is too attenuated a basis on which to exercise jurisdiction. Second, California does not recognize conspiracy as a basis for acquiring personal jurisdiction. Mansour v. Super. Ct., 38 Cal. App. 4th 1750, 1760 (1995). These allegations do not give rise to a basis for exercising specific personal jurisdiction.

2. Stream of Commerce

PMC does not manufacture, distribute, or service any goods, materials or products that might enter the "stream of commerce." PMC is merely a holding company of PMI and plaintiff has failed to establish in his supporting documentation that PMC participated in the research and design of cigarettes sold by PMI in California. There is no basis for personal jurisdiction under the stream of commerce theory.

3. Alter Ego Theory

Plaintiff's primary theories supporting the exercise of jurisdiction are that PMC is the "alter ego" of PMI and that PMC exercises control over PMI under traditional principals of agency. Accordingly, he reasons that forum-related activities of PMC's subsidiary, PMI, establish the requisite contact for exercising jurisdiction over PMC. However, in Dymits v. American Brands, Inc, the court held that PMC was "merely a holding company" of PMI and did not "engage in the business of producing tobacco products." No. 96-1897, 1996 WL 75111, at 5 (N.D. Cal. Dec 31, 1996). The court found that the plaintiff failed to show that the subsidiaries of the defendant holding company were established for, or engaged in, activities that, but for the existence of the subsidiaries, the parents would have to undertake themselves. Id. Plaintiff failed to show this relationship between PMC and PMI, and also failed to distinguish the facts in this case from the facts in Dymits.

Plaintiff notes some of the factors used to determine whether a court should "pierce the corporate veil" and consider the subsidiary an alter ego of the parent such as undercapitalization of the subsidiary, disregard of corporate formalities, lack of segregation of corporate records, or an identity of directors and officers. However, plaintiff fails to allege how these factors apply to this case. Plaintiff does not allege that PMI is undercapitalized. PMC and PMI keep separate books and bank accounts and are managed by separate executive officers and boards of directors. Affidavit of Kathleen S. Lampe, 1:28-2:1. The transcript of testimony submitted as "[Second] Judicial Notice in Support of Plaintiff's Opposition" is

irrelevant to PMC's alleged involvement in the activities of PMI because the document itself does not identify PMC's role in PMI's activities. PMC is not the "alter ego" of PMI and should not be subject to jurisdiction based on its status as a holding company of PMI.

D. Plaintiff's Entitlement to Discovery on Jurisdiction

Where a plaintiff's claims of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery. Terracom v. Valley Nat'l Bank, 49 F.3d 555, 562 (9th Cir. 1995). Plaintiff's claim is attenuated and defendant PMC has made specific denials to plaintiff's claim. Defendant's argument against allowing plaintiff to conduct discovery on personal jurisdiction is also persuasive because plaintiff has had access to documents in the Minnesota depository, which were produced in previous litigation, that could have established this Court's jurisdiction over PMC. Plaintiff has had the opportunity to amend his complaint, re-brief the issue, and provide the Court with relevant documents, but has not been able to carry his burden of showing that the Court may exercise jurisdiction over PMC.

## IV. ORDER

Based on the foregoing, the Court grants defendant's motion to dismiss for lack of personal jurisdiction.

IT IS SO ORDERED.

Dated: November 9, 2000

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX F-6

FILED SEP 13 2000
PM 3:16
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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| MAHER W. SOLIMAN,<br><br>Plaintiff,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED, et. al,<br><br>Defendants. | NO. C00-1530MJJ<br><br>~~[PROPOSED]~~ ORDER |

On August 29, 2000 at 9:30 a.m., the following motions were set for hearing before the Court:

1. The Motion to Dismiss Plaintiffs' Complaint filed by Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company; and the Council for Tobacco Research - USA, Inc; and joined in by the Tobacco Institute, Inc. and Liggett Group, Inc.;

2. The Motion to Strike Certain Portions of Plaintiff's Complaint filed by (and joined in by) the same defendants referenced in the preceding paragraph;

3. Defendant Philip Morris Companies Inc.'s Motion to Dismiss for Insufficiency of Service of Process and Lack of Personal Jurisdiction;

4. Specially Appearing Defendant Brown & Williamson Tobacco Company's Motion to Dismiss Pursuant to Rule 12(b)(4) and (5);

5. Specially Appearing Defendant Lorillard Tobacco Company's Motion to Dismiss Pursuant to Rule 12(b)(4) and (5);

6. Plaintiff's Motion to Substitute Fictitiously Named Defendants.

The Court first considers the Motion to Dismiss Plaintiff's Complaint, as the granting of that motion would effectively eliminate the need to consider the other motions.

Certain Defendants have moved to dismiss all nine of Plaintiff's causes of action on the grounds that those causes of action are barred by the one-year statute of limitations, CCP section 340(3), that is applicable to personal injury actions. Alternatively, Certain Defendants argue that the Fourth, Fifth, Sixth , and Ninth Causes of Action should be dismissed on grounds independent of the statute of limitations.

As to the statute of limitations defense, the Court finds that there are grounds to dismiss all nine causes of

action, as Plaintiff has indicated that he is relying on the discovery rule, and he clearly has not plead the requisite "discovery" facts as required by *McKelvey v. Boeing North American, Inc.*, 74 Cal. App. 4th 151 (1999). Likewise, the Court agrees with Defendants that Plaintiff's Fourth, Fifth, Sixth, and Ninth causes of action have been deficiently plead for reasons independent of the statute of limitations.

With the exception of the Ninth Cause of Action for Intentional Infliction of Emotional Distress, the Court, however, cannot determine at this point whether it is impossible for plaintiff to plead any facts which would correct the deficiencies in his Complaint. Therefore, the Court sustains Defendants' Motion to Dismiss the first eight causes of action, but it grants Plaintiff leave to amend to attempt to replead those eight causes of action so as to overcome the limitations bar. The Court also grants Plaintiff leave to amend to attempt to replead his Fourth, Fifth, and Sixth causes of action so as to cure the additional deficiencies, independent of the statute of limitations, in those particular causes of action. The Court finds that no facts could be plead which would overcome the deficiencies with the Ninth Cause of Action for Intentional Infliction of Emotional Distress, and therefore, that cause of action is dismissed with prejudice.

Because Plaintiff is being allowed to replead his first eight causes of actions, the Court does not, at this time, consider Certain Defendants' Motion to Strike Certain Portions of Plaintiff's Complaint.

The Court next addresses the Motion to Dismiss for Insufficiency of Service of Process and Lack of Personal Jurisdiction of Defendant Philip Morris Companies Inc. ("PMC"). Defendant PMC states that it was able to determine that it had, in fact, been properly served with process, and therefore, it withdraws insufficient service of process as a basis for its dismissal. As to PMC's argument that it should be dismissed because the Court does not have personal jurisdiction over it, the Court finds that there are sufficient grounds to grant Defendant PMC's Motion to Dismiss on that basis. Nevertheless, the Court will grant Plaintiff leave to amend to attempt to replead sufficient facts to establish the Court's jurisdiction over PMC.

Finally, the Court addresses the Motion to Dismiss Pursuant to Rule 12(b)(4) and (5) of Specially Appearing Defendant Brown & Williamson Tobacco Company ("Brown & Williamson"); and the Motion to Dismiss Pursuant to Rule 12(b)(4) and (5) of Specially Appearing Defendant Lorillard Tobacco Company ("Lorillard"). The Court finds that Plaintiff clearly has not properly served either of those two moving defendants. Thus, the Court finds basis to grant those motions, but will grant Plaintiff leave to amend to add Brown & Williamson and Lorillard and serve them pursuant to Rule 4. Because of this ruling, the Court need not further consider Plaintiff's Motion to Substitute Fictitiously Named Defendants.

Based upon the foregoing, the Court orders as follows:

1. The Motion to Dismiss Plaintiff's Complaint filed by Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company; and The Council for Tobacco Research - USA, Inc; and joined in by The Tobacco Institute, Inc; and Liggett Group, Inc. is SUSTAINED, and leave to amend is GRANTED to Plaintiff to replead the first eight caused of action of his Complaint.

2. Plaintiff's Ninth Cause of Action for Intentional Infliction of Emotional Distress is DISMISSED with prejudice.

3. Defendant PMC's Motion to Dismiss for Insufficiency of Service of Process and Lack of Personal Jurisdiction is DENIED as to the argument that process was insufficient and is SUSTAINED as to the argument that the Court lacks personal jurisdiction over Defendant PMC. Leave to Amend is GRANTED to Plaintiff to attempt to replead facts regarding this Court's jurisdiction over Defendant PMC.

4. The Court also finds grounds to sustain the Motions to Dismiss of Defendant Brown & Williamson and Defendant Lorillard, but Plaintiff is GRANTED leave to amend his Complaint to add those two defendants and to serve them pursuant to Fed. R. Civ. P. 4.

5. Plaintiff's Amended Complaint must be filed no later than twenty days from the date of the hearing on the above referenced motions. If no amended pleading is

filed on or before that date, the Court will dismiss the action with prejudice.

IT IS SO ORDERED.

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

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APPENDIX F-7

FILED JUL 21 2000
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MAHER W. SOLIMAN,<br><br>Plaintiff,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED, PHILIP MORRIS COMPANIES, R.J. REYNOLDS TOBACCO COMPANY, COUNCIL FOR TOBACCO RESEARCH U.S.A., INC., TOBACCO INSTITUTE, INC., and DOES 1 through 40, inclusive,<br><br>Defendants. | NO. C00-1530MJJ<br><br>ORDER DENYING PLAINTIFF'S MOTION FOR REMAND |

Before the Court is plaintiff Maher W. Soliman's motion to remand. Having read the moving and responding papers, the Court DENIES plaintiff's motion for the reasons set forth below.

I. BACKGROUND AND PROCEDURAL POSTURE

Soliman, a citizen of California, filed suit in the Superior Court of San Francisco on March 28, 2000 against defendants Philip Morris Incorporated ("PMI"), Philip Morris Companies, Inc. ("PMC"), R.J. Reynolds Tobacco

Company ("RJR"), The Council for Tobacco Research - U.S.A., Inc. ("CTR"), and the Tobacco Institute ("TI") in which the plaintiff alleges nine causes of action based upon smoking related injuries.

Defendant PMI is a Virginia corporation with its principle place of business in New York. Defendant PMC is an out-of-state stock holding company incorporated in Virginia with its principle place of business in New York. Defendant RJR is a New Jersey corporation with its principle place of business in North Carolina. Defendant CTR is a dissolved New York corporation concluding its affairs with leased office space in New York. Defendant TI is in the process of dissolving itself as a New York Corporation with its principle place of business in the District of Columbia.

Defendants RJR and CTR were properly served with a copy of the Complaint on March 31, 2000. Defendant PMC was served with plaintiff's complaint on March 31, 2000 and defendant TI was served with the plaintiff's complaint on April 3, 2000. On May 1, 2000, three of the defendants (RJR, PMI and CTR) filed a Notice of Removal to federal court based upon diversity of citizenship. An Amended Notice of Removal in which defendants TI and PMC joined the removal was filed on May 10, 2000. The basis for removal in the Amended Notice of Removal, diversity of citizenship, remained unchanged.

## II. LEGAL STANDARD

A party can remove a case to federal court only if the case could be brought in federal court originally. 28 U.S.C. §1441(a). Federal diversity jurisdiction requires both complete diversity of the parties and an amount in controversy exceeding $75,000. See 28 U.S.C. §1332(a).

The party seeking removal bears the burden of showing the propriety of removal. See Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988). In accordance with the law's presumption against removal, the court must resolve any jurisdictional doubts in favor of the party seeking remand. See Gans v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

## III. ANALYSIS

Plaintiff asserts that the removal is defective for two

reasons. First, plaintiff maintains that this case does not fall within the Court's federal question jurisdiction. Plaintiff's Reply Memorandum to Defendants Opposition to Plaintiff's Motion for Remand ("Reply") at 2. Second, plaintiff argues that removal is improper because defendants PMC and TI filed an untimely notice of removal and should not be allowed to amend their notice pursuant to 28 U.S.C. §1653. Id.

A. Jurisdiction Based Upon Diversity of Citizenship

Plaintiff argues that removal of this case is improper because the court lacks subject-matter jurisdiction to hear the case since the defendants do not propose a federal question pursuant to 28 U.S.C. §1331. Plaintiff's Memorandum of Points and Authorities in Support of Motion to Remand ("Mem.") at 3. Defendants never propose subject-matter jurisdiction predicated upon a federal question. Rather, defendants' assert that their basis for federal jurisdiction is diversity of citizenship. Defendants Notice of Removal and Request for Jury Trial at 2; Defendants Amended Notice of Removal and REquest for Jury Trial at 2.

A defendant may remove a case that could have been commenced in federal court based on diversity of citizenship. See 28 U.S.C. §1441(b). Under 28 U.S.C. 1332(a), "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between- (1) citizens of different States." However, 28 U.S.C. §1441(b) bars removal of an action on the basis of diversity by a citizen of the forum state. A corporation is deemed a citizen of both the state of its incorporation and the state of its principal place of business. See 28 U.S.C. §1332(c).

Plaintiff alleges in his own complaint that (1) he is a resident of California; (2) all named defendants are corporations or associations located in other states; and (3) he is entitled to $100,000,000 in actual damages. Compl. at 2-3, 31. There is no debate that the requisite diversity of citizenship existed both at the time of suit and the time of removal. This Court holds that the plaintiff has simply failed to consider diversity as a basis for federal

jurisdiction and as a result, finds plaintiff's subject-matter jurisdiction arguments as a basis for remand meritless.

B. Notice of Removal

Plaintiff additionally argues that the case can be remanded because defendants' decision to join TI and PMC to the removal notice occurred after the expiration of the permissible thirty-day amendment period to correct defective allegations of jurisdiction under 28 U.S.C. §1446(b). Reply at 3. As such, the defendants should not be permitted to amend their notice of removal as allowed by 28 U.S.C. §1653.

"The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter." 28 U.S.C. §1446(b).

Under 28 U.S.C. §1446(a), all defendants in a state action must join in the petition for removal, except for nominal, unknown or fraudulently joined parties. See Emrich, 846 F.2d at 1193 n.1 (9th Cir. 1988); Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986). "This general rule applies, however, only to defendants properly joined and served in the action." Hewitt, 798 F.2d at 1233; Salverson v. Western States Bankcard Ass'n., 731 F.2d 1423, 1429 (9th Cir. 1984) (noting "a party not served need not be joined" in a petition for removal). Because the right of removal is jointly held by all defendants, the failure of one defendant to join in the notice precludes removal. See Hewitt v. City of Stanton, 789 F.2d 1230, 1232-1233 (9th cir. 1986). "Where fewer than all defendants have joined in a removal action, the removing party has the burden under section 1446(a) to explain affirmatively the absence of any co-defendants in the notice for removal." Prize Frize, Inc. v. Matrix (U.S.) Inc., 167 F.3d 1261, 1266 (9th Cir. 1999).

Defendants argue that TI and PMC were not required to join in the original notice of removal or alternatively,

even if they were, amendment of the notice was permitted under 28 U.S.C. §1653 since adding defendants PMC and TI does not add an additional or different basis for jurisdiction. Defendants Memorandum in Opposition to Plaintiff's Motion for Remand ("Opp.") at 2.

In the instant case, the Court finds that TI and PMC were required to join the notice of removal, but that they cured this defect by timely amendment under 28 U.S.C. §1653, or alternatively, pursuant to Federal Rule of Civil Procedure 15(a).

1. Service of Process

Defendants maintain that "unless TI had been properly served as of the date the action was removed (May 1, 2000), it was not required to join the notice of removal." Opp. at 3. Since plaintiff's service of process upon defendant TI was defective, defendants contend, it was not required to join the notice of removal. Id at 3.

A defendant may not be required to take any action in a civil case until proper service has been made, including a requirement that the defendant be forced to consider whether to join in the notice of removal. See Murphy Brothers, Inc. v. Michetti Pipestringing, Inc., 119 S. Ct. 1322, 1327 (1999).[1] Service on a corporation is proper if accepted by: (1) a person designated as an agent to receive process; (2) a corporate officer, i.e., president, vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager; or (3) a person authorized by the corporation to receive service of process. See Cal. Civ. Proc. Code §416.10. The sufficiency of service of process prior to removal from state court is determined under state law. See Lee v. City of Beaumont, 12 F.3d 933, 936-37 (9th Cir. 1993).

Defendants stipulate to the fact that TI is a dissolved corporation, that Debbie Thomas is the Executive Assistant to the Senior Vice President, and that service of process was received April 3, 2000. Opp. at 3-4. Defendants sole contention is that Ms. Thomas is not

[1] But see Teitelbaum v. Soloski, 843 F.Supp. 614, 615 (C.D. Cal. 1994)(a defendant who received a copy of the complaint through improper service may be required to join in the notice of removal reasoning that the 30 -day period for removal begins to run from the date first defendant receives notice).

among the enumerated individuals authorized to accept service of process. Id. at 3-4.

"Despite the language of the Rule, service of process is not limited solely to officially designated officers, managing agents, or agents appointed by law for the receipt of process. The rules are to be applied in a manner that will best effectuate their purpose of giving the defendant adequate notice." Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc. 840 F.2d 685, 688 (9th Cir. 1988).[2] See also Warner Bros. Records, Inc. v. Golden West Music Sales, 36 Cal. App.3d 1012, 1017 (1974) (statutes governing service of process should be liberally construed to effectuate service if actual notice has been received by the defendant noting "[a] specific appointment is not required, but the principal-agent relationship must be close and enduring enough to make it highly probable that the defendant will receive actual notice." (citation omitted)). Generally, service is sufficient when made upon an individual who stands in such a position as to render it fair and reasonable that the defendant will receive actual notice if it is served on the agent. See Warner Bros. Records, Inc. 36 Cal.App.3d at 1017; Direct Mail Specialists, 840 F.2d at 688; Union Asbestos & Rubber Co. v. Evans Prods Co., 328 F.2d 949, 952-53 (7th Cir. 1964) (service on a secretary was held good but the court noted the extenuating circumstances that the defendant was out of the office 75-80% of the time and that the notice was immediately communicated to the defendant).

In Direct Mail, the Ninth Circuit held that service of process on a receptionist in a shared office of defendant corporation and another corporation was deemed proper to create personal jurisdiction. Direct Mail, 840 F.2d at 689. Service of process was made upon a receptionist when she told the process server that she was the only one in the office. The court reasoned that the company was small, presumably the role played by the receptionist was commensurately large in the corporate structure

[2] Rule 4 of the Federal Rules of Civl Procedure and California Civil Procedure Code §416.10 both ennumerate the same entities of a corporation who can be properly served. Accordingly, the Court analogizes here from federal law.

demonstrated by the fact that she was the only employee in the office when the process server arrived, and the defendant received actual notice of receipt a day later from the receptionist. Id. at 688-89.

Following the reasoning of Direct Mail, this Court does not have to reach far in determining service of process upon Ms Thomas was proper. Here, the plaintiff maintains that TI is a "dissolved corporation, has no agent, [no] corporate officer, president, vice president, secretary or a general manager.....[and] Ms. Thomas was served with two copies of the process on April 3, 2000,....[and was] the only individual in the dissolved office." Reply at 8. Ms. Thomas was the only one in the office when served, presumably her role was even more critical than that of a receptionist since she was the executive assistant to a Vice President, and unlike Direct Mail, service occurred in an unshared office space. It is reasonable to believe that Ms. Thomas would promptly deliver the notice to her boss[3] or alternatively, if he had been released from the dissolved corporation, that service upon Ms. Thomas was itself proper. This court holds that on the instant record, service of process was proper, thereby triggering the defendants thirty-day period for filing a removal petition.

2. Nominal Party

Defendants argue that PMC is a nominal party whose inclusion in the notice of removal was not required. Opp. at 4.

Nominal parties need not join in a notice for removal. See 28 U.S.C. §1446(b); Hewitt, 789 F.2d at 1232-33. A defendant is a nominal party where his role is limited to that of a stakeholder or depository. See id, at 1233; Securities and Exch. Comm'n v. Michael Colello, 139 F.3d 674, 676 (9th Cir. 1998)("[t]he paradigmatic nominal defendant is a trustee, agent, or depository....[who is] joined purely as a means of facilitation collection." (citation omitted)). The question of whether or not a named defendant is a nominal party depends on the facs of each case. See Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Presmen and Assistants' Local 349, 427 F.2d 325,

[3] An enumerated corporate. See Cal. Civ. Proc. Code §416.10.

327 5th Cir. 1970). It is unclear whether parent companies per se are nominal parties. See Shaw v. Dow Brands, Inc. 994 F.2d 364, 369 (7th Cir. 1993)(finding Dow Chemical, parent of Dow Brands, did not have to join removal petition).

Contrary to defendants assertion, plaintiff alleges that "both companies [PMC and PMI] were engaged in a joint effort to place the product in a worldwide market, the profits from both companies were dependent on the performance of the other and both companies while maintaining a separate corporate existence, were interdependent."[4] Reply at 7. This Court believes that it would be premature to hold that PMC is a nominal party prior to discovery and therefore finds that PMC should not have been excluded from the original removal notice as a nominal party per se.

3. Amendment Pursuant to 28 U.S.C. §1653

Defendants argue that if the omission of PMC and TI from the original notice of removal was improper, the omission was a non-jurisdictional defect that could be cured by amendment under 28 U.S.C. §1653. Opp. at 5. Plaintiff argues the petition cannot be amended because such defects are fatal and incurable. Reply at 9.

"Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S. C. §1653. In the Ninth Circuit, as in every federal circuit that has dealt with the question, defects in form of a removal petition are amendable at any time, not just within the original thirty-day period for removal. See Barrow Development Co. v. Fulton Ins. Co., 418 F.2d 316, 317 (9th Cir 1969). Only when defendants attempt to assert totally new grounds for removal or "to create jurisdiction where none existed," will courts deny leave to amend. See Rockwell International Credit Corporation v. United States

[4] In support of their contention that PMC is a nominal party, defendants note that "Judge Wilken of this District has previously determined that, because [PMC] is a stock holding company that has never manufactured, promoted, or sold cigarettes in California, [PMC] is not personally subject to the jurisdiction of a California court." Opp. at 4-5; See Dymits v. American Brands, Inc. WL 751111, *2, 7 (N.D. Cal. 1996). In the face of plaintiff's allegations, however, the Court finds that defendants have failed to proffer evidence sufficient to defeat a motion to remand in light of the law's policy favoring remand.

Aircraft Insurance Group, 823 F.2d 302 (9th Cir. 1987).

The failure to join all defendants in a removal petition may otherwise render the removal petition procedurally defective and thus curable by amendment at any time. See Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988); Parrino v. FHP, Inc. 146 F.3d 699, 703 (9th Cir. 1988), cert. denied, 119 S. Ct. 510 (1998)(failure of one defendant to join in removal notice until almost two months after service of complaint is a procedural defect that was cured by joinder).

Specifically, the Ninth Circuit in Parrino upheld the addition of a defendant to a notice of removal two months after service of the complaint. See id, at 703. While the plaintiff argued that removal was improper because the procedural requirements for the statute were not satisfied when all required defendants did not join the notice of removal within the required thirty-day statutory period, the court reasoned that remand would be an "empty formality" where the defendant had cured any defect by belatedly joining the notice of removal. See id. at 703.

Parrino dictates denial of the instant motion to remand. Here, defendants seek to add PMC and TI to the notice of removal approximately five weeks after the original service of process, nine days after the expiration of the thirty-day statutory period under §1446(b). In adding TI and PMC to the notice of removal, defendants have kept their basis for removal, diversity, the same. Defendants do not attempt to assert a new ground for removal which would preclude leave to amend. Accordingly, this Court cannot find any evidence on this record as to why the defendants should not be permitted to join defendants PMC and TI in the removal notice.

4. Amendment Pursuant to Rule 15(a)

Defendants argue in passing that amendment is also permitted under Rule 15(a) of the Federal Rules of Civil Procedure since the Amended Notice of Removal was served prior to plaintiff filing his motion to remand. Opp. at 6-7 n.2.

Removal notices are considered pleadings for the purposes of applying Rule 15. See Jones v. City of Buffalo, 867 F.Supp. 1155, 1167 (W.D.N.Y. 1994); Handy v.

Uniroyal, Inc. 298 F.Supp. 301, 305 (D.Del. 1969); Carter v. American Bus Lines, Inc. 22 F.R.D. 323, 326 (D. NEB. 1958)("the word 'pleadings'.....[should not be] restricted to those papers set forth in Rule 7(a)"). Rule 15(a) permits a party to amend a pleading "once as a matter of course at any time before a responsive pleading is served or...at any time within 20 days after it is served" if no responsive pleading is permitted. See Fed. R. Civ. Proc. 15(a). The Rule further states that "[a] party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

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Here, defendants filed their Amended Notice of Removal with this Court on May 10, 2000. Plaintiff filed his Objection to Removal on May 15, 2000. Under Rule 15(a), there is no question that the defendants Amended Notice of Removal was filed prior to the plaintiff's objection. Accordingly, the Court finds that defendants are entitled to amendment pursuant to Rule 15(a), providing an alternate basis for denial of plaintiff's motion to remand.

IV. ORDER

Based on the foregoing, the Court DENIES plaintiff's motion to remand.

IT IS SO ORDERED.

Dated: 7/21/2000

"s/_____"
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

VOLUME I
APPENDIX G

No. 01-15387

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| MAHER W. SOLIMAN,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>PHILIP MORRIS INCORPORATED, et al.<br><br>Defendants-Appellees. | ) NO. 01-15387<br>) DC - CV - 00-01530-MJJ Northern California (San Francisco) |

APPEAL FROM THE DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
HONORABLE MARTIN J. JENKINS JUDGE
NORTHERN DISTRICT OF CALIFORNIA
NO. 00-1530-MJJ

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# APPELLANT'S PETITION FOR REHEARING EN BANC (FRAP 35)

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## I. INTRODUCTION

### A. STATEMENT 0F COUNSEL

Pursuant to FRAP 35, petitioner-appellant submits to this Court his PETITION FOR REHEARING EN BANC, because in his judgment, the opinion by Honorable Cynthia Holcomb Hall, Honorable Alex Kozinski and Honorable M. Margaret McKeown on November 22nd, 2002 directly conflicts with an existing opinion by another Court of Appeal and substantially affects a rule of national application in which there is an overriding need for national uniformity.

The opinion directly conflicts with:

(1) Existing opinion by United States Supreme Court in the case of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, (1992) [a copy is attached hereto for the Court's convenience as Plaintiff-Appellant's Exhibit A.] and the California Supreme Court in the case of Mangini v. R.J. Reynolds Tobacco Col (1994) 7 Cal.4th 1057, 1066 holding that:

(a) Misrepresentation by false statements - even in "advertising or promotion" - which is based "not on a duty 'based on smoking and health' but rather on a more general obligation - the duty not to deceive." 505 U.S. at pp. 528-529;

(b) Concealment of facts based on a "duty to disclose such facts through channels of communication other than advertising or promotion." Id at p. 528;

(c) Negligence based on "actions unrelated to advertising or promotion," such as negligent "testing or research practices." Id. at pp. 524-525;

(d) Breach of express warranty, which rests not on a "state law" duty but rather on a duty "imposed by the warrantor." Id at pp. 525-537; and

(e) Conspiracy to "misrepresent or conceal material facts," which arises from a "duty not to conspire to commit fraud." Id. at p. 530.

(2) Existing opinion by the California Supreme Court published on or about the same time this case was submitted in the case of Naegele v. R.J.R. Tobacco Company, Case No. S090420, the Court observed: "Section 402A of the Restatement proposes generally that

when a manufacturer or distributor sells a product "in a defective condition unreasonably dangerous to the user or consumer" [citation], and the product reaches that person, as expected and intended, without substantial change in its condition, the seller is 'subject to liability' for physical harm 'thereby caused to the ultimate user or consumer.'" In other words, the Court distinguished between injuries caused by the defective product and injuries that were caused by something not inherent in the product itself that defendants "lied about the addictive nature of smoking." In "a campaign designed to deceive the public, plaintiff, the government, and others as to the health hazards of smoking." A true copy is attached hereto for the Court's convenience and marked as Plaintiff-Appellant's Exhibit B.

(3) Existing opinion by California Supreme Court in the case of *Committee on Children's Television Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 (allowing fraud claim for misleading television ads about nutritional value of defendant's breakfast cereals.)

(4) Existing opinion by the California Supreme Court in Khan v. Shiley, 217 Cal.App.3d 848, 855-58, 266 Cal, Rptr. 106 (1990), the court stated:

> Product liability is the name currently given to the area of law involving the liability of those who supply goods or products for the use of others to purchasers, users and bystanders for losses of various kinds resulting from so-called defects on those products. (Prosser & Keeton, Torts (5th ed. 1984 & sect95, p. 677.) Possible theories of recovery include strict liability in tort, negligence (i.e., in creating or failing to discover a flaw, in failing to warn or failing adequately to warn, or in the sale of defectively designed product) and breach of warranty (express and implied). Allegations of fraud, however, are in a class by themselves.....Unlike the other theories, in which the safety and efficacy of the product is assailed, the fraud claim impugns Defendants' conduct.

(5) Existing opinion by the First Appellate

District, Division Four. appeal docket number A086991 (11/07/01) in the case of Patricia Henley v. Philip Morris Inc. (San Francisco County, Super. Ct. No. 995172); the Court affirmed plaintiff's award of claims for "personal injuries allegedly sustained as a result of defendant's tortious misconduct in the manufacture and marketing of cigarettes" [A true copy is attached hereto for the Court's convenience and marked as Plaintiff-Appellant's Exhibit C.]

Furthermore, this opinion directly contradicts the expressed intent by the California Legislature to repeal the tobacco industry's immunity from personal injury suits provided in Civil Code Section 1714.45 (the "1998 Amendment") because:

> "Evidence has now become available showing tobacco companies may have deliberately manipulated the level of nicotine, a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers. In addition, evidence shows the tobacco companies have systematically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use."

Thus, the very basis for the 1998 Amendment by the Legislature is recently available evidence concerning the cigarette industry's past conduct.

In enacting the (1998 Amendment) the California Legislature amended Civil Code Section 1714.45 and clearly expressed its intent that personal injury actions were to be allowed based on the cigarette industry's past conduct.

> "(f) It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted a the 1997-98 Regular Session to declare that there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers and their successors in interest by California smokers or others who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale or

> consumption of tobacco products. It is also the intention of the Legislature to clarify that such claims which were or are brought shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense. Civ. C. §1714.45(f).

This plain language allowing claims by California smokers who "have suffered or incurred injuries, damages or costs" which "were or are brought shall be determined on the merits without the imposition of any claim of statutory bar." Clearly, this opinion is not the result intended by the Legislature.

The opinion further contradicts Rest.2d Torts, 402B; A "public" misrepresentation of "material fact" in "advertising" about the "character or quality of a chattel" creates "liability for physical harm...caused by justifiable reliance on the misrepresentation."

The opinion also contradicts California Business and Professions Code Section 17200 et seq. targets "unfair competition," which is defined as "any unlawful, unfair or fraudulent business act or practice...." and "unfair, deceptive, untrue, or misleading advertising....." including any act prohibited by Business and Professions Code Section 17500 et seq. The California Supreme Court has held that the Legislature, in enacting the unfair competition law, "intended this sweeping language to include anything that can properly be called a business practice and that at the same time is forbidden by law." *See, Stop Youth Addiction Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 560. (quotations omitted.) Any business practice that is "unlawful" in the sense that it violates a specific statute may be injoined under Business & Professions Code Section 17203, even though it injures consumers as distinguished from competition. See, *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197; *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94. The sale of cigarettes to minors has been a criminal offense in this state since at least 1892, when section 308 of the Penal Code first took effect. Stats. 1891, ch. 70, §1, p. 64.

Section 17200 authorizes a court to hear an action for

relief "upon the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members or the general public." Cal. Bus. & Prof. Code §17201. thus, plaintiff-appellant clearly has standing to sue under the Unfair Competition Law on behalf of himself.

The opinion further contradicts Business & Professions Code Section 17500 which makes it unlawful for any person, firm, corporation, or association, or any employee thereof, to make or disseminate or cause to be made or disseminated, either to the public in California or from California to the public in any state, any statement concerning real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition of the property or services, if the statement is (1) untrue or misleading, (2) is known, or by the exercise of reasonable care should be known, to be untrue or misleading, and (3) is made or disseminated or caused to be made or disseminated with intent directly or indirectly to dispose of the property, to perform the services, or to induce the public to enter into any obligation relating thereto. The prohibition extends to statements in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatsoever. Bus. & Prof. Code §17500.

It is also unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claims, including claims that (1) purport to be based on factual, objective, or clinical evidence, (2) compare the products effectiveness or safety to that of other brands or products, or (3) purport to be based on any fact. Bus & Prof. Code §17508(a). A statement is untrue or misleading for purposes of Business and Professions Code Section 17500 if members of the public are likely to be deceived. Actual deception or confusion is not required. Therefore, a violation of the statute is actionable without individualized proof of deception, reliance, and injury. Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197.

Finally, as to the timeline, this opinion contradicts

Bus. & Prof. Code §17208, which provides that an action to enforce any cause of action under the Business and Professions Code, Section 17200 et seq. must be commenced within four years after the cause of action accrued.

In addition, Plaintiff-Appellant submits to this Court that in his judgment, the following situations exist:

1. A material point of fact is overlooked in the decision;
2. A material point of law is overlooked in the decision; and
3. An apparent conflict with another decision of the Court which was not addressed in the opinion.

1. A material point of fact is overlooked in the decision

This Court stated at page 9 in the opinion:

> "[1] Product liability claims are subject to a one-year statute of limitations in California. Cal.Civ.Proc. Code §340(3). This provision bars untimely personal injury claims based on defective products regardless of the particular legal theory invoked."

However, plaintiff-appellant's personal injury claims are not based on defective products, rather are caused by defendants' dishonest conduct. Appellant Opening Brief explicitly stated at page 4-5 as follows:

> "Plaintiff claims that this action is NOT based on injuries 'caused by a product' but rather asserts that his injuries were caused by defendants' dishonest conduct."

See also, First Amended Complaint ¶¶268, 283, 285. Indeed, plaintiff's claims for personal injury are based on defendants' dishonest conduct. Defendants Council for Tobacco Research and Tobacco Institute do NOT manufacture, produce, sell or market any product, nonetheless, they are defendants in this case because of their outrageous dishonest conduct.

The issue before the court is NOT when did the plaintiff know about the health risks or discovered the addiction of smoking; the question before the Court is when did the plaintiff discover defendants' misconduct? On or about October 15th 1999, plaintiff discovered defendants' misconduct when it was revealed in the "news" segment on MSNBC. See First Amended

Complaint, paragraph 23. Assuming that plaintiff should have known of defendants' misconduct when the statute first passed on January 1st, 1998, which provides that:

> "Evidence has not become available showing tobacco companies may have deliberately manipulated the level of nicotine , a powerfully addictive substance, in tobacco products so as to create and sustain addiction in smokers. In addition, evidence shows the tobacco companies have systematically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of tobacco use." (Civil Code Section 1714.45)

Plaintiff will still be well within the four year statute of limitations pursuant to Business and Professions Code 17208.

Plaintiff's first amended complaint further alleged breach of specially assumed duty. See First Amended Complaint ¶¶87, 122, 123, 126, 130, 131, 132, 142, 260. The tobacco defendants undertook a duty to protect the public's health by supporting independent research into the safety of tobacco, disclosing the results of that research and refraining from marketing products they knew would cause disease and death. Meanwhile, defendants suppressed the results of research demonstrating that smoking caused death and disease and continued to sell products they knew caused death and disease, while at the same time altering their products to make them more addictive and halting the development of safer cigarettes. Regardless of whether the tobacco companies had any duty to speak publicly on the subject, having repeatedly undertaken to do so, they were legally bound to speak the full and complete truth. *Bank of America v. Greenbach*, 98 Cal. App.2d 232 (1950). Not only did defendants willfully fail to perform this duty; they actively conspired to conceal, suppress and distort the scientifically established facts they knew.

2. A material point of law is overlooked in the decision

This Court has overlooked that plaintiff-appellant's claims for Strict Liability, Negligence and Misrepresentation are brought under Section 402-B; his claims for Fraud, Deceit and Fraudulent Concealment are

brought under Bus. & Prof. Code Section 17200 et seq.; and his claims for Breach of Express Warranty, Breach of Implied Warranty and Intentional Misrepresentation by False and Misleading Advertising are brought under Bus. & Prof Code Sections 17500-1572. Furthermore, this Court overlooked that an action to enforce any cause of action under the Business & Professions Code, Section 17200, et seq. must be commenced within four years after the cause of action accrued. Bus & Prof Code Section 17208.

3. An apparent conflict with another decision of the Court which was not addressed in the opinion

This decision of the Court is contradicted by the United States Supreme Court decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-529 (1992), that defendants' advocacy activities can be seen as violations of the "duty not to deceive" which is under Cipollone.

II REPREHENSIBILITY OF DEFENDANTS' CONDUCT

The record fully supports finding that defendants knew by the late 1950's and early 1960's that the nicotine in cigarettes is highly addictive, that substances in cigarette tar cause lung cancer, and that no substantial medical or scientific doubt existed on this crucial fact. Nevertheless, motivated primarily by a professional desire to generate wealth, Philip Morris, in concert with other major tobacco companies, consistently endeavored through calculated misrepresentations to create doubts in the minds of smokers, especially addicted smokers such as plaintiff herein, that cigarettes are neither addictive, nor disease producing. In the language of a key internal document revealing the plan, Philip Morris and other tobacco companies set out to "create doubt about the health charge without actually denying it." First Amended Complaint ¶144.

The evidence supports a finding that in 1954, Philip Morris promised in a public announcement, run in over 400 newspapers nationwide, to pursue objective research into the health risks of smoking and to release the results for the benefit of consumers (See the "Frank Statement to Cigarette Smokers" FAC at ¶123). But, to the contrary, Philip Morris and other tobacco companies privately constrained research to produce results casting doubt on the alleged risks of smoking and went to extraordinary

lengths to hide its own scientific information showing the company was fully aware of the true health dangers. One revealing memo written to the Company's top research scientists disclosed a practice of "burying" adverse internal research results ("[if the study proves nicotine is addictive] we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have.") Plaintiff's First Amended Complaint ¶144.

The record adequately demonstrates that Philip Morris and other tobacco companies publicly and falsely represented that: no proof existed that smoking causes cancer, knowing the opposite was true; that authorities have reached no agreement on what causes lung cancer, knowing the opposite was true; and that smoking is not addictive, knowing the opposite was true. While Philip Morris and other tobacco companies claim to have been relying on certain technical definitions of the language it used, the tobacco industry intended its publicly and widely disseminated words to be understood in a nontechnical sense, communicating a false impression that the nicotine in cigarettes is not in fact addictive and that cigarette tars do not in fact cause cancer. Addiction by the layman was understood as a habit of addiction which is not an injury in itself, however, addiction as concealed by the tobacco industry was a harmful drug addiction which is severe injury. Such addiction was not known by the average layman of the community prior to 1998.

Information, widely disseminated by tobacco industry provides that tobacco industry's doubt-creating scheme fully succeeded in the case of plaintiff herein an other similarly situated addicted to nicotine in cigarettes. This concerted effort to create doubt with misinformation was initiated long before the federal government enacted labeling statutes and was carried out for decades thereafter through the late 1990's.

Substantial evidence supports a finding that tobacco industry was aware people who do not begin smoking in their adolescence are unlikely to become heavily addicted, life-long smokers. Philip Morris and other tobacco manufacturers focused its marketing on children, including the adolescent such as plaintiff herein in the 1960's,

placing advertising where children were more likely to see it and crafting ads appealing to youthful passions for feelings of independence, identity and acceptance.

Circumstances surrounding the repeal of California Civi Code §1714.45 (enacted in 1987 and repealed in 1998) suggests some, if not a majority, of California's legislators in 1998 were deeply disturbed by revelations flowing from ongoing investigations of Philip Morris.

III. DEFENDANTS' BREACH OF ASSUMED DUTY
(FAC at ¶¶87, 89)

In this case, plaintiff's First Amended Complaint alleges that defendants' voluntarily assumed special duties by issuing the "Frank Statement to Cigarette Smokers":

"We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

"We always have and always will cooperate closely with those whose task it is to safeguard the public health."

"We are pledging aid and assistance to the research effort into all phases of tobacco use and health." First Amended Complaint ¶123.

Later, defendants published "A Statement About Tobacco and Health":

"We recognize that we have a special responsibility to the public - to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use. We accepted this responsibility in 1954 by establishing the TIRC....We shall continue all possible efforts to bring the facts to light." First Amended Complaint ¶131.

Defendants have re-affirmed these undertakings in various ways over the years. First Amended Complaint ¶¶132, 133, 134, 135, 136, 137.

In making these commitments, defendants assumed duties to plaintiff and to the public in general. Defendants specifically pledged and undertook "a special responsibility to the public" and "accept[ed] an interest in people's health as.....paramount to every other consideration in [their] business." Id.

In accepting these responsibilities, defendants undertook three specific duties. First, by committing themselves to making the people's health their preeminent

responsibility, the tobacco companies agreed that they would not sell or continue to sell products which they knew to cause death and disease when used as intended. The violation of this specially assumed duty is the direct cause of Plaintiff's injuries (See FAC ¶87, 89). Second, defendants pledged to cooperate with those responsible for safeguarding the public's health. In fact, they did the opposite. Third, regardless of whether the tobacco companies had any duty to speak publicly on the subject, having repeatedly undertaken to do so, they were legally bound to speak the full and complete truth. *Bank of America v. Greenbach, supra,* 98 Ca. App. d at 232. Not only did defendants willfully fail to perform this duty, they actively conspired to conceal, suppress and distort the scientifically established facts that they knew.

Defendants reasonably should have foreseen the risk of harm that physical injury to cigarette smokers was not only foreseeable, it was contemplated as the inevitable consequence of a breach of defendants' undertakings. With regard to physical addiction, such injury was intended as defendants manipulated and tampered the nicotine in cigarettes to sustain addiction. The injuries suffered by plaintiff are closely connected with defendants' conduct. Defendants' conduct is morally reprehensible. The tobacco defendants' undertook a duty to protect the public's health by supporting independent research into the safety of tobacco disclosing the results of the research, and refraining from marketing products they knew would cause disease and death. Meanwhile, defendants suppressed the results of research demonstrating that smoking caused death and disease and continued to sell products they knew caused death and disease, while at the same time altering their products to make them more addictive and halting the development of safer cigarettes.

This action is for injuries caused by dishonesty and the failure to fulfill commitments. The injury alleged is not an invasion of the right to safe products, but an invasion of the rights to be dealt with honestly and to have commitments performed. See Cipollone v. Liggett Group Inc., 505 U.S. 504 (1992) (liability for fraud is based on a "general obligation - the duty not to deceive"). In short,

the cause of the harm here was the defendants' conduct, not their products. [This point also holds true for the plaintiffs claims that the defendants breached their specially assumed duty to make safety the companies primary concern. Had defendants not undertaken such an obligation (and not committed the other misconduct alleged), section 1714.45 would protect them from liability for marketing products that were inherently unsafe. Having publicly committed themselves to safety, however, and having acted to enhance the danger of their products, defendants invaded the public's and the plaintiff's interests in truthfulness. That legal injury was caused by conduct, not by products.]

The distinction between claims based on dishonest conduct and claims based on defective products is well established in California law. In Khan v. Shiley, 217 Cal.App.3d 848, 855-58, 266 Cal. Rptr. 106 (1990), the court stated:

"Products liability is the name currently given to the area of law involving the liability of those whose supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products. (Prosser & Keeton, Torts (5th ed. 1984 &sect95, p. 677.) Possible theories of recovery include strict liability in tort, negligence (i.e., in creating or failing to discover a flaw, in failing to warn or failing adequately to warn, or in the sale of a defectively designed product) and breach of warranty (express and implied). Allegations of fraud, however, are in a class by themselves....Unlike the other theories, in which the safety and efficacy of the product is assailed, the fraud claim impugns defendants' conduct."

Based on this distinction, the court dismissed the plaintiff's claims for emotional distress based on product liability, but upheld claims based on fraud. See also Westlye v. Look Sports, 17Cal.App. 4th 1715, 1741-1750, 22 Cal. Rptr. 781 (1993) (classifying claims for products liability separately from claims based on misrepresentation); 6 Witkin, supra, Torts, & sect&sect674 et seq., &sect&sect948 et seq., &sect&sect1241 et seq. (addressing liability for fraud in Chapter VI, separate from discussion in Chapters VII and IX of liability for defective

products).

Similar reasoning underlies the Supreme Court's decision in Cipollone v. Liggett Group, Inc. supra, 505 U.S. 504. The plurality held that federal laws mandating warnings on cigarette packages did not preempt state laws permitting recovery for fraud and false advertising. The Court reasoned that the federal statutes only preempted local laws allowing actions "based on smoking and health", and that liability for fraud is predicated "on a more general obligation - the duty not to deceive." Id at 528-29. Similarly, the court found no preemption of claims for a breach of express warranty, based as they were on a voluntary undertaking of the manufacturer. Id. at 525-26; accord, Mangini v. R.J.Reynolds Tobacco Co., 7 Cal. 4th 1057, 1068, 31 Cal. Rptr. 2d 358 (1994) (federal law does not preempt California statute that protects minors from cigarette advertising.)

These results are consistent with section 1714.45(a)(2), which expressly refers to Comment i of Section 402A of the Restatement (Second) of Torts. Comment i explains that a manufacturer escapes liability where the product is inherently unsafe, but is liable if the manufacturer's conduct adds to the danger of a product.

Comment i states, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous." Here, defendants are alleged to have added to the danger of cigarettes by deliberately enhancing the addictive quality of nicotine. FAC ¶¶189-233. Thus, section 1714.45 does not protect defendants liability caused by their altered product.

In fact, these exceptions confirm that the Legislature intended to protect inherently unsafe products, but did not intend to immunize misconduct by manufacturers. A breach of an express warranty is an affirmative misrepresentation about the product. A manufacturing defect is a mistake in the manufacturing process that adds to the product's danger. Yet both types of claims fall within the rubric of "product liability actions." See, e.g. *Barker v. Lull Engineering*, 20 Cal. 3d 413, 429, 143 Cal. Rptr. 225 (1978) (manufacturing defect); *Westlye v. Look*

*Sports, supra,* 17 Cal. App. 4th at 1748 (express warranty). Therefore, to exclude such misconduct from the reach of section 1714.45 required an express exception.

By contrast, while also involving misconduct, allegations of fraud (or breach of an assumed duty) do not fall within the rubric of product liability; they "are in a class by themselves." *Khan,* 217 Cal.App.3d at 857. Therefore, there was no need to name fraud as an exception to section 1714.45's prohibition. In *City and County of San Francisco v. Philip Morris Inc.* (N.D. Cal. 1997) 957 F. Supp. 1130, 1140, the Court, in deciding an action brought by various counties against cigarette manufacturers, held that "California law recognizes a distinction between claims based on fraudulent conduct and claims based on defects in a product." (Emphasis added.) The Court approvingly cited Khan v. Shiley, which recognized the distinction between fraud actions and actions based on smoking and health. Based on this distinction, the Court found that plaintiff's state law fraud and special duty claims were not barred by the former version of Civil Code Section 1714,45. *City and County of San Francisco, supra,* 957 F.Supp. at 1140. No California appellate court has ruled otherwise.

## IV. PLAINTIFF'S CLAIMS ARE GOVERNED BY BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ UNDER THE UNFAIR COMPETITION LAW AND THE FALSE ADVERTISING LAW

Business and Professions Code Section 17200, 17203, and 17204 authorize an action for unfair competition against a person or business that engages in false or misleading advertising. Business and Professions Code Sections 17500-17582 governs false or misleading advertising.

In Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197 a group of plaintiffs filed a complaint charging a cereal manufacturer, a retailer, and two advertising agencies with fraudulent, misleading and deceptive advertising in the marketing of sugared breakfast cereals. The complaint contained causes of action based on two consumer protection statutes (Bus. & Prof. Code §17200 et seq., unfair competition; and Bus. & Prof. Code ¶17500 et seq., unfair advertising). Defendants

demurrer was sustained without leave to amend by the trial court.

The California Supreme Court reversed and remanded for further proceedings. holding that the complaints stated a cause of action for injunctive relief and restitution under the unfair competition law and the false advertising law. The California Supreme Court stated:

"Plaintiff's second cause of action is based on Business and Professions Code Section 17500 and subsequent sections (the false advertising law), which prohibits the dissemination in any advertising media of any 'statement' concerning real or personal property offered for sale, 'which is untrue or misleading, ads which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading,' Bus. & Prof. Code, §17500. Section 17535 authorizes injunctive relief and restitution....Any violation of the false advertising law, moreover, necessarily violates the unfair competition law.

"To state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public area are likely to be deceived.' (citations omitted.) Allegations of action deception, reasonable reliance, and damage are unnecessary. The court may also order restitution without individualized proof of deception, reliance, and injury if it 'determines that such a remedy is necessary 'to prevent the use or employment' of the unfair practice....."

".....Defendants engaged in a nationwide, long-term advertising campaign designed to persuade children to influence their parents to buy sugared cereals. Adapted to its audience, the campaign sought to persuade less by direct representation that by imagery and example. While maintaining a constant theme, the particular advertisements changed frequently. Plaintiffs now contend that these advertisements were deceptive and misleading, and while we do now know the actual truth of those charges, we must assume them true for the purpose of this appeal.....

".....The California Legislature.....has enacted consumer protection statutes and codified common law remedies which in principle apply to all deceptive

advertising, regardless of complexity and scale.....

"We therefore conclude that plaintiff's complaint states a cause of action for injunctive relief and restitution under the unfair competition law (Bus. Prof. code §17200 et seq.) and the false advertising law (Bus. & Prof. Code §17500 et seq.)...." *Committee on Children's Television v. General Foods Corp.* (1984) 35 Cal.3d 197, 210-23.

As in *Committee on Children's Television, supra,* Plaintiffs complaint properly states causes of action based on Business and Professions Code Section 17500 and subsequent sections (the false advertising law), which prohibits the dissemination in any advertising media of any "statement" concerning real or personal property offered for sale, "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue and misleading." Bus. & Prof. Code §17500. Plaintiff's complaint requests Equity relief and restitution as authorized by Section 17353.

Plaintiffs complaint alleges that defendants participated in a long-term advertising campaign designed to persuade children to purchase cigarettes (FAC ¶¶234-249) and that these advertisements were deceptive and misleading. This false and unlawful advertising concealed the true facts concerning the health hazards of smoking, the addictive nature of nicotine, and the cigarette manufacturers' manipulation of the levels of nicotine in cigarettes so as to create and sustain addiction in smokers, including minors.

The Unfair Competition Law applies to all deceptive advertising, regardless of complexity and scale. Therefore, plaintiff's complaint states causes of action under the Unfair Competition Law (Bus. & Prof. Code §17200 et seq.) and the false advertising law (Bus. & Prof. Code §17500 et seq.)

## V. BUSINESS AND PROFESSIONS CODE SECTION 17208 GOVERNS THE TIMELINE FOR STATUTE OF LIMITATIONS FOR PLAINTIFF'S CLAIMS

An action to enforce any cause of action under the Business & Professions Code, Section 17200 et seq. must be commenced within four years after the cause of action accrued. Bus. & Prof. Code §17208.

In Suh v. Yang (N.D. Cal. 1997) 987 F.Supp. 783 the

Court held that competitor's wrongful dilution of a martial arts school operator's service name represented multiple, continuous acts that delayed the accrual of the four-year limitations period applicable to the operator's unfair competition claim under Business and Professions Code Section 17208. The court also noted that the "doctrine of equitable tolling" suspends the running of the statute of limitations if the plaintiff proves that the defendant fraudulently concealed the existence of the cause of action so that the plaintiff acting as a reasonable person, did not know of its existence.

".....Plaintiff's claims for unfair competition would not be barred by the four year statute of limitations since the alleged wrongs.....are multiple, continuous acts, and some of these acts have occurred within the limitations period.....

".....In this case, each allegedly infringing display of Defendant's service name....could create a separate cause of action for unfair competition.....

".....Therefore, Defendants' counter-motion for summary judgment based upon the running of the statute of limitations is DENIED." *Suh v. Yang* (N.D. Cal. 1997) 987 F.Supp. 783, 95-796.

Here, as in *Suh v. Yang, supra,* clearly Plaintiff's causes of action under the unfair competition law (Bus. & Prof. Code §17200 et seq.)

## VI. CONCLUSION

For the foregoing reasons,appellants petition for rehearing en banc should be granted. Wherefore, appellant prays for an order of the Court setting aside the judgment and directing the District C ourt to enter a new order accordingly.

December 2nd, 2002

Respectfully submitted:
"s/_____"
Maher W. Soliman, JD
Appellant in Pro Se

U.S. Supreme Court

CIPOLLONE v. LIGGETI GROUP, INC., 505 U.S. 504 (1992)

505 U.S. 504

THOMAS CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR

OF THE ESTATE OF ROSE D. CIPOLLONE, PETITIONER

v.

LIGGETT GROUP, INC., ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 90-1038

Argued October 8, 1991 Reargued January 13, 1992

Decided June 24, 1992

Section 4 of the Federal Cigarette Labeling and Advertising Act (1965 Act) required a conspicuous label warning of smoking is health hazards to be placed on every package of cigarettes sold in this country, while 5 of that Act, captioned "Preemption," provided: "(a) No statement relating to smoking and health, other than the r 4] statement..., shall be required on any cigarette package," and (b) No [such] statement.., shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with 4. Section *5(b)* was amended by the Public Health Cigarette Smoking Act of 1969 (1969 Act) to specify: No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes

the packages of which are [lawfully] labeled." Petitioner's complaint in his action for damages invoked the District Court's diversity jurisdiction and alleged, inter alia, that respondent cigarette manufacturers were responsible for the 1984 death of his mother, a smoker since 1942, because they breached express warranties contained in their advertising, failed to warn consumers about smoking's hazards, fraudulently misrepresented those hazards to consumers, and conspired to deprive the public of medical and scientific information about smoking, all in derogation of duties created by New Jersey law. The District Court ultimately ruled, among other things, that these claims were preempted by the 1965 and 1969 Acts to the extent that the claims relied on respondents' advertising, promotional, and public relations activities after the effective date of the 1965 Act. The Court of Appeals affirmed on this point.

*Held.*

The judgment is reversed in part and affirmed in part, and the case is remanded.
893 F.2d 541, reversed in part, affirmed in part, and remanded.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, III, and IV, concluding that 5 of the 1965 Act did not [505 U.S. 504.505] preempt state-law damages actions, but superseded only positive enactments by state and federal rulemaking bodies mandating particular warnings on cigarette labels or in cigarette advertisements. This conclusion is required by the section's precise and narrow prohibition of required cautionary "statement[s]"; by the strong presumption against preemption of state police power regulations; by the fact that the required 4 warning does not, by its own effect, foreclose additional obligations imposed under state law; by the fact that there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of common-law damages

actions; and by the Act's stated purpose and regulatory context, which establish that 5 was passed to prevent a multiplicity of pending and diverse "regulations," a word that most naturally refers to positive enactments, rather than common-law actions. Pp. 517-520.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR, concluded in Parts V and VI that *5(b)* of the 1969 Act preempts certain of petitioner's failure-to-warn and fraudulent misrepresentation claims, but does not preempt other such claims or the claims based on express warranty or conspiracy. Pp. 520-530.

(a) The broad language of amended 6 *5(b)* extends the section's preemptive reach beyond positive enactments to include some common-law damages actions. The statutory phrase "requirement or prohibition" suggests no distinction between positive enactments and common law, but, in fact, easily encompasses obligations that take the form of common-law rules, while the phrase "imposed under State law" clearly contemplates common law as well as statutes and regulations. This does not mean, however, that *5(b)* preempts all common-law claims, nor does the statute indicate that any familiar subdivision of common law is or is not preempted. Instead, the precise language of 5(b) must be fairly but - in light of the presumption against preemption - narrowly construed, and each of petitioner's common-law claims must be examined to determine whether it is in fact preempted. The central inquiry in each case is straightforward: whether the legal duty that is the predicate of the common-law damages action satisfies 5(b)'s express terms, giving those terms a fair but narrow reading. Each phrase within the section limits the universe of common-law claims preempted by the statute. Pp. 517-524.

(b) Insofar as claims under either of petitioner's failure-to-warn theories - i.e., that respondents were negligent in the manner that they tested, researched, sold, promoted, and

advertised their cigarettes, and that they failed to provide adequate warnings of smoking's consequences - require a showing that respondents' post-1969 advertising or *[505 U.S. 504, 506]* promotions should have included additional, or more clearly stated, warnings, those claims rely on a state-law "requirement or prohibition.., with respect to... advertising or promotion" within 5(b)'s meaning and are preempted. P. 525-527.

(c) To the extent that petitioner has a viable claim for breach of express warranties, that claim is not preempted. While the general duty not to breach such warranties arises under state law, a manufacturer's liability for the breach derives from, and is measured by, the terms of the warranty. A common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement.., imposed under State law" under 5(b). Pp. 525-527.

(d) Because 5(b) preempts "prohibition[s]" as well as "requirement[s]," it supersedes petitioner's first fraudulent misrepresentation theory, which is predicated on a state-law prohibition against advertising and promotional statements tending to minimize smoking's health hazards, and which alleges that respondents' advertising neutralized the effect of the federally mandated warning labels. However, the claims based on petitioner's second fraudulent misrepresentation theory - which alleges intentional fraud both by false representation and concealment of material facts - are not preempted. The concealment allegations, insofar as they rely on a state-law duty to disclose material facts through channels of communication other than advertising and promotions, do not involve an obligation "with respect to" those activities within 5(b)'s meaning. Moreover, those fraudulent misrepresentation claims that do arise with respect to advertising and promotions are not predicated on a duty "based on smoking and health," but rather on a more general obligation - the duty not to deceive. Pp. *527-529.*

(e) Petitioner's claim alleging a conspiracy among respondents to misrepresent or conceal material facts concerning smoking's health hazards is not preempted, since the predicate duty not to conspire to commit fraud that underlies that claim is not a prohibition "based on smoking and health" as that 5(b) phrase is properly construed. P. 530.

JUSTICE BLACKMIJN, joined by JUSTICE KENNEDY and JUSTICE SOUTER, concluded that the modified language of *5(b)* in the 1969 Act does not clearly exhibit the necessary congressional intent to preempt state common law damages actions, and therefore concurred in the judgment that certain of petitioners failure to warn and fraudulent misrepresentation claims, as well as his express warranty and conspiracy claims, are not preempted by Act. P. 533-534.

JUSTICE SCALIA, joined by JUSTICE THOMAS, concluded that all of petitioner's common law claims are preempted by the 1969 Act under ordinary principles of statutory construction, and therefore concurred in the judgment that certain of his post-1969 failure-to-warn claims [505 U.S. 504, *507]* and certain of his fraudulent misrepresentation claims are preempted. P. 548.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which REUNQUIST, C.J., and WHITE, BLACKMUN, O'CONNOR, KENNEDY; and SOUTER, JJ., joined, and an opinion with respect to Parts V and VI, in which REUNQUIST, C.J., and WHITE and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which KENNEDY and SOUTER, JJ., joined, post, p. 531. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined, post, p. 544.

Laurence H. Tribe reargued the cause for petitioner. Marc

Z. Edell argued the cause for petitioner on the original argument. with them on the briefs was Alan M. Darnell.

H. Bartow Farr III reargued the cause for respondents. With him on the briefs was Richard G. Taranto. *

[Footnote * ] Briefs of amici curiae urging reversal were filed for the State of Minnesota et al. by Hubert H. Humphrey III, Attorney General of Minnesota, and Peter M. Ackerberg, Special Assistant Attorney General, and by the Attorneys General for their respective State as follows: James H. Evans of Alabama, Grant Woods of Arizona, Richard Blumenthal of Connecticut, Larry EchoHawk of Idaho, Michael E. Carpenter of Maine, Frankie Sue Del Papa of Nevada, Robert J. Del Tufo of New Jersey, Tom Udall of New Mexico, Nicholas J. Spaeth of North Dakota, Lee Fisher of Ohio, and Kenneth 0. Elkenberry of Washington; for the American Cancer Society et al. by Alan B. Morrison, David C. Vladeck, and Comish F. Hitchcock; for the American College of Chest Physicians by Raymond D. Cotton and Sherman S. Poland; for the American Medical Association by Kirk B. Johnson; for the Association of Trial Lawyers of America by Jeffrey Robert White and Michael C. Maher; for the National League of Cities et al. by Richard Ruda; for Six Former Surgeons General of the United States et al. by S. Stephen Rosenfeld and Richard A. Daynard; and for Trial lawyers for Public Justice, P.C., by Charles S. Siegel and Arthur Bryant.

Briefs of amici curiae urging affirmance were filed for the Association of National Advertisers, Inc., by Burt Neuborne

and Gilbert H. Weil; for the National Association of Manufacturers by Diane L. Zimmerman, Jan 5. Amundson, and

Quentin Riegel; and for the Product Liability Advisory Council, Inc., by Kenneth S. Geller and Mark I. Levy. [505 U.s.

504, 508]

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts V and VI.

"WARNING: THE SURGEON GENERAL HAS

DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH."

A federal statute enacted in 1969 requires that warning (or a variation thereof) to appear in a conspicuous place on every package of cigarettes sold in the United States. 1 The questions presented to us by this case are whether that statute, or its 1965 predecessor which required a less alarming label, preempted petitioner's common-law claims against respondent cigarette manufacturers.

Petitioner is the son of Rose Cipollone, who began smoking in 1942 and who died of lung cancer in 1984. He claims that respondents are responsible for Rose Cipollone's death because they breached express warranties contained in their advertising, because they failed to warn consumers about the hazards of smoking, because they fraudulently misrepresented those hazards to consumers, and because they conspired to deprive the public of medical and scientific information about smoking. The Court of Appeals held that petitioner's state-law claims were preempted by federal statutes, 893 F.2d 541 (CA3 1990), and other courts have agreed with that analysis. 2 The highest court of the State New Jersey, however, has held that the federal statutes *[505 U.S. 504,509]* did not preempt similar common-law claims. 3 Because of the manifest importance of the issue, we granted certiorari to resolve the conflict, 500 U.S. 499, 935 (1991). We now reverse in part and affirm in part.

I

On August 1, 1983, Rose Cipollone and her husband filed a complaint invoking the diversity jurisdiction of the Federal District Court. Their complaint alleged that Rose Cipollone developed lung cancer because she smoked cigarettes manufactured and sold by the three respondents. After her death in 1984, her husband filed an amended complaint. After trial, he also died; their son, executor of both estates, now maintains this action.

Petitioner's third amended complaint alleges several different bases of recovery, relying on theories of strict liability, negligence, express warranty, and intentional tort. These claims, all based on New Jersey law, divide into five categories. The "design defect claims" allege that respondents' cigarettes were defective because respondents failed to use a safer alternative design for their products and because the social value of their product was outweighed by the dangers it created (Count 2, App. 83-84). The "failure to warn claims' allege both that the product was defective as a result of [respondents'] failure to provide adequate warnings of the health consequences of cigarette smoking" (Count 3, App. *85)* and that respondents "were negligent in the manner [that] they tested, researched, sold, promoted and advertised" their cigarettes (Count 4, App. 86). The "express warranty claims" allege that respondents had "expressly *[505* U.S. 504, 510] warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences"(Count 7, App. 88). The "fraudulent misrepresentation claims" allege that respondents had willfully, "through their advertising, attempted to neutralize the [federally mandated] warnin[g]" labels (Count 6, App. 87-88), and that they had possessed, but had "ignored and failed to act upon," medical and scientific data indicating that "cigarettes were hazardous to the health of consumers" (Count 8, App. 89). Finally, the "conspiracy to defraud claims" allege that respondents conspired to deprive the public of such medical and scientific data (ibid.).

As one of their defenses, respondents contended that the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and its successor, the Public Health Cigarette Smoking Act of 1969, protected them from any liability based on their conduct after 1965. In a pretrial ruling, the District Court concluded that the federal statutes were intended to establish a uniform warning that would prevail throughout the country, and that would protect

cigarette manufacturers from being "subjected to varying requirements from state to state," Cipollone v. Liggett Group, Inc., 593 F.Supp. 1146, 1148 (N.J. 1984), but that the statutes did not preempt common-law actions. Id., at 1153-1170. 4 Accordingly, the court granted a motion to strike the preemption defense entirely. [505 U.S. 504,511]

The Court of Appeals accepted an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and reversed. Cipollone v. Liggett Group, Inc., 789 F.2d 181 (CA3 1986). The court rejected respondents' contention that the federal Acts expressly preempted common-law actions, but accepted their contention that such actions would conflict with federal law. Relying on the statement of purpose in the statutes, 5 the court concluded that Congress' "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy" would be upset by state-law damages actions based on noncompliance with "warning, advertisement, and promotion obligations other than those prescribed in the [federal] Act." Id., at 187. Accordingly, the court held:

"[T]he Act pre-empts those state law damage[s] actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. [W]here the success of a state law damage[s] claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act." Ibid. (footnote omitted).

*[505* U.S. 504, 512]

The court did not, however, identify the specific claims asserted by petitioner that were preempted by the Act.

This Court denied a petition for certiorari, 479 U.S. 1043 (1987), and the case returned to the District Court for trial. Complying with the Court of Appeals, mandate, the District Court held that the failure-to-warn, express warranty, fraudulent-misrepresentation, and conspiracy-to-defraud claims were barred to the extent that they relied on respondents' advertising, promotional, and public relations activities after January 1, 1966 (the effective date of the 1965 Act). 649 F.Supp. 664, 669, 673-675 (N.J. 1986). The court also ruled that, while the design defect claims were not preempted by federal law, those claims were barred on other grounds 6 Id_ at 669-672. Following extensive discovery and a 4-month trial, the jury answered a series of special interrogatories and awarded $400,000 in damages to Rose Cipollone's husband. In brief, it rejected all of the fraudulent misrepresentation and conspiracy claims, but found that respondent Liggett had breached its duty to warn and its express warranties before 1966. It found, however, that Rose Cipollone had "involuntarily and unreasonably encounter[ed] a known danger by smoking cigarettes," and that 80% of the responsibility for her injuries was attributable to her. See 893 F.2d, at *554* (summarizing jury findings). For that reason, no damages were awarded to her estate. However, the jury awarded damages to compensate her husband for losses caused by respondents' breach of express warranty.

On cross-appeals from the final judgment, the Court of Appeals affirmed the District Court's preemption rulings, but remanded for a new trial on several issues not relevant to our decision. We granted the petition for certiorari to consider the preemptive effect of the federal statutes. [505 U.S. 504,513]

II

Although physicians had suspected a link between smoking and illness for centuries, the first medical studies of that connection did not appear until the 1920's. See U.S. Dept. of Health and Human Services, Report of the

Surgeon General, Reducing the Health Consequences of Smoking: 25 Years of Progress 5 (1989). The ensuing decades saw a wide range of epidemiologic and laboratory studies on the health hazards of smoking. Thus, by the time the Surgeon General convened an advisory committee to examine the issue in 1962, there were more than 7,000 publications examining the relationship between smoking and health. Id., at 5-7.

In 1964, the advisory committee issued its report, which stated as its central conclusion; "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." U.S. Dept. of Health, Education, and Welfare, U.S. Surgeon General's Advisory Committee, Smoking and Health 33 (1964). Relying in part on that report, the Federal Trade Commission (FTC), which had long regulated unfair and deceptive advertising practices in the cigarette industry, 7 promulgated a new trade regulation rule. That rule, which was to take effect January 1, 1965, established that it would be a violation of the Federal Trade Commission Act "to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container [of cigarettes] that cigarette smoking is dangerous to health and may cause death from cancer and other diseases." 29 Fed. Reg. 8325 (1964). Several States also moved to regulate the advertising and labeling of cigarettes. See, e.g., 1965 N.Y. Laws, ch. 470; see also 111 Cong.Rec. 13900-13902 (1965) (statement of Sen. Moss). Upon a congressional request, the FTC postponed enforcement of its *[505* U.S. 504,514] new regulation for six months. In July, 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act (1965 Act or Act). 8 The 1965 Act effectively adopted half of the FTC's regulation: the Act mandated warnings on cigarette packages ( 5(a)), but barred the requirement of such warnings in cigarette advertising ( *5(b)).* 9

Section 2 of the Act declares the statute's two purposes: (1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) protecting the national

economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations. 10 In furtherance of the first purpose, 4 of the Act made it unlawful to sell or distribute any cigarettes in the United States unless the package bore a conspicuous label stating:

"CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH." In furtherance of the second purpose, 5, captioned "Preemption," provided in part:

"(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

"(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act."

Although the Act took effect January 1, 1966, 10 of the Act provided that its provisions affecting the regulation of advertising would terminate on July 1, 1969.

As that termination date approached, federal authorities prepared to issue further regulations on cigarette advertising. The FTC announced the reinstitution of its 1964 proceedings [*505* U.S. 504,515] concerning a warning requirement for cigarette advertisements. 34 Fed. Reg. 7917 (1969). The Federal Communications Commission (FCC) announced that it would consider "a proposed rule which would ban the broadcast of cigarette commercials by radio and television stations." Id., at 1959. State authorities also prepared to take actions regulating cigarette advertisements. 11

It was in this context that Congress enacted the Public Health Cigarette Smoking Act of 1969 (1969 Act or Act), 12 which amended the 1965 Act in several ways. First, the

1969 Act strengthened the warning label, in part by requiring a statement that cigarette smoking "is dangerous," rather than that it "may be hazardous." Second, the 1969 Act banned cigarette advertising in "any medium of electronic communication subject to [FCC] jurisdiction." Third, and related, the 1969 Act modified the preemption provision by replacing the original 5(b) with a provision that reads:

"(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Although the Act also directed the FTC not to take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising, the narrowing of the preemption provision to prohibit only restrictions "imposed under State law" cleared the way for the FTC to extend the warning label requirement to print advertisements for cigarettes. The FTC did so in 1972. See In re Lorillard, 80 F.T.C. *455* (1972). [505 U.S. 504,516]

III

Article VI of the Constitution provides that the laws of the United States shall be the supreme Law of the Land;.., any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. Art. VI, el. 2. Thus, since our decision in M'Culloch v. Maryland, 4 Wheat. 316,427 (1819), it has been settled that state law that conflicts with federal law is "without effect." Maryland v. Louisiana, 411 ~. 725 7.46 (1981). Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by... Federal Act unless that [is] the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218. 230 (1947). Accordingly, "' [t]he

purpose of Congress is the ultimate touchstone"' of preemption analysis. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, *525* (1977). In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, see Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204 (1983), or if federal law so thoroughly occupies a legislative field " as to make reasonable the inference that Congress left no room for the States to supplement it."' Fidelity Fed. Say. & Loan Assn. v. De la Cuesta, 458 U.S. 141, ] 53 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S., at 230).

The Court of Appeals was not persuaded that the preemption provision in the 1969 Act encompassed state common-law claims. 13 789 F.2d, at 185-186. It was also *[505* U.s. 504, 517] not persuaded that the labeling obligation imposed by both the 1965 and 1969 Acts revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and health. Id., at 186. Nevertheless, reading the statute as a whole in the light of the statement of purpose in 2, and considering the potential regulatory effect of state common-law actions on the federal interest in uniformity, the Court of Appeals concluded that Congress had impliedly preempted petitioner's claims challenging the adequacy of the warnings on labels or in advertising or the propriety of respondents' advertising and promotional activities. Id., at 187.

In our opinion, the preemptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in S of each Act. When Congress has considered the issue of preemption and has included in the enacted legislation a

provision explicitly addressing that issue, and when that provision provides " indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S., at 505 , "there is no need to infer congressional intent to preempt state laws from the substantive provisions" of the legislation. Califomia Federal Savings & Loan Assn. v. Guerra, ~ (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of expression unius est exclusio alterius: Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond S of each Act. Therefore, we need only identify the domain expressly preempted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn. [505 U.S. 504. 518]

IV

In the 1965 preemption provision regarding advertising ( *5(b)*), Congress spoke precisely and narrowly: "No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes." Section *5(a)* used the same phrase ("No statement relating to smoking and health") with regard to cigarette labeling. As *5(a)* made clear, that phrase referred to the sort of warning provided for in 4, which set forth verbatim the warning Congress determined to be appropriate. Thus, on their face, these provisions merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels ( *5(a)*) or in cigarette advertisements
( *5(b)*).

Beyond the precise words of these provisions, this reading is appropriate for several reasons. First, as discussed above, we must construe these provisions in light of the presumption against the preemption of state police power regulations. This presumption reinforces the

appropriateness of a narrow reading of 5. Second, the warning required in 4 does not, by its own effect, foreclose additional obligations imposed under state law. That Congress requires a particular warning label does not automatically preempt a regulatory field. See McDermott v. Wisconsin, ~ -132 (1913). Third, there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1986, 14 Congress expressly preempted state or local imposition of a "statement relating to the use of smokeless tobacco products and health" but, at the same time, preserved state-law damages actions based on those products. See 15 U.S.C. 4406. All of these considerations indicate that S is best read as having superseded *[505* U.S. 504, 519] only positive enactments by legislatures or administrative agencies that mandate particular warning labels. 15

This reading comports with the 1965 Act's statement of purpose, which expressed an intent to avoid "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to the Surgeon General's report, the term "regulation" most naturally refers to positive enactments by those bodies, not to common-law damages actions.

The regulatory context of the 1965 Act also supports such a reading. As noted above, a warning requirement promulgated by the FTC and other requirements under consideration by the States were the catalyst for passage of the 1965 Act. These regulatory actions animated the passage of 5, which reflected Congress" efforts to prevent "a multiplicity of State and local regulations pertaining to labeling of cigarette packages," H.R.Rep. No. 449, 89th Cong., 1st Sess., 4 *(1965),* and to preemp[t] all Federal,

State, and local authorities from requiring any statement relating to smoking and health in the advertising of cigarettes. Id., at 5 (emphasis supplied). 16

For these reasons, we conclude that 5 of the 1965 Act only preempted state and federal rulemaking bodies from [505 U.S. 504,520] mandating particular cautionary statements, and did not preempt state-law damages actions. 17

V

Compared to its predecessor in the 1965 Act, the plain language of the preemption provision in the 1969 Act is much broader. First, the later Act bars not simply "statement[s]," but rather "requirement[s] or prohibition[s] ... imposed under State law." Second, the later Act reaches beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.

Notwithstanding these substantial differences in language, both petitioner and respondents contend that the 1969 Act did not materially alter the preemptive scope of federal law. 18 Their primary support for this contention is a sentence in a Committee Report which states that the 1969 amendment "clarified" the 1965 version of 5(b). S. Rep. No. 9 1-566, p. 12(1969). We reject the parties' reading as incompatible with the language and origins of the amendments. As we noted in another context, "[i]nferences from legislative history cannot rest on so slender a reed. Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). The 1969 Act worked substantial changes in the law: rewriting the label warning, banning broadcast advertising, and allowing the FTC to regulate print advertising. In the context of such revisions and in light of the substantial changes in wording, [505 U.S. 504, 521] we cannot accept the parties' claim that the 1969 Act did not alter the reach of 5(b). 19

Petitioner next contends that 5(b), however broadened by the 1969 Act, does not preempt common-law actions. He offers two theories forlimiting the reach of the amended 5(b). First, he argues that common-law damages actions do not impose "requirement[s] or prohibition[s]," and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]." 20 We disagree; such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common-law damages actions. The phrase "[n]o requirement or prohibition" sweeps broadly, and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." San Diego Building Trades Council v. Garmon, 359 U.S. 236. 247 (1959).

Although portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities, see S. Rep. No. 9 1-566, p. 12, the language of the Act plainly reaches beyond such enactments. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." Shaw *[505* U.S. 504, 522] v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) . In this case, there is no "good reason to believe" that Congress meant less than what it said; indeed, in light of the narrowness of the 1965 Act, there is "good reason to believe" that Congress meant precisely what it said in amending that Act.

Moreover, common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose

"requirements or prohibitions." See W. Prosser, Law of Torts 4 (4th ed. 1971); Black's Law Dictionary 1489(6th ed. 1990) (defining "tort" as "always [involving] a violation of some duty owing to plaintiff"). It is in this way that the 1969 version of 5(b) differs from its predecessor: whereas the common law would not normally require a vendor to use any specific statement on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions. We therefore reject petitioner's argument that the phrase "requirement or prohibition" limits the 1969 Act's preemptive scope to positive enactments by legislatures and agencies.

Petitioner's second argument for excluding common-law rules from the reach of 5(b) hinges on the phrase "imposed under State law." This argument fails as well. At least since Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), we have recognized the phrase "state law" to include common law as well as statutes and regulations. Indeed just last Term, the Court stated that the phrase "'all other law, including State and municipal law'" "does not admit of [a] distinction... between positive enactments and common law rules of liability." Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117. 128 (1991). Although the presumption against preemption might give good reason to construe the phrase "state law" in a preemption provision more narrowly than an identical phrase in another context, in this case such a construction is not appropriate. As explained above, the *[505* U.S. 504, 523] 1965 version of S was precise and narrow on its face; the obviously broader language of the 1969 version extended that section's preemptive reach. Moreover, while the version of the 1969 Act passed by the Senate preempted "any State statute or regulation with respect to... advertising or promotion," S. Rep. No. 9 1-566, p. 16 (1969), the Conference Committee replaced this language with "State law with respect to advertising or promotion." In such a situation, 5(b)'s preemption of "state law" cannot fairly be limited to positive enactments.

That the preemptive scope of 5(b) cannot be limited to positive enactments does not mean that that section preempts all common-law claims. For example, as respondents concede, 5(b) does not generally preempt "state law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes." 21 For purposes of 5(b), the common law is not of a piece.

Nor does the statute indicate that any familiar subdivision of common-law claims is or is not preempted. We therefore cannot follow petitioner's passing suggestion that 5(b) preempts liability for omissions, but not for acts, or that 5(b) preempts liability for unintentional torts, but not for intentional torts. Instead, we must fairly but - in light of the strong presumption against preemption - narrowly construe the precise language of 5(b), and we must look to each of petitioner's common-law claims to determine whether it is in fact preempted. 22 The central inquiry in each case is [505 U.S. 504, 524] straightforward: we ask whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking and health.., imposed under State law with respect to... advertising or promotion, giving that clause a fair but narrow reading. As discussed below, each phrase within that clause limits the universe of common-law claims preempted by the statute.

We consider each category of damages actions in turn. In doing so, we express no opinion on whether these actions are viable claims as a matter of state law; we assume, arguendo, that they are.

Failure to Warn

To establish liability for a failure to warn, petitioner must show that "a warning is necessary to make a product... reasonably safe, suitable and fit for its intended use," that respondents failed to provide such a warning, and that

that failure was a proximate cause of petitioner's injury. Tr. 12738. In this case, petitioner offered two closely related theories concerning the failure to warn: first, that respondents "were negligent in the manner [that] they tested, researched, sold, promoted, and advertised" their cigarettes; and second, that respondents failed to provide "adequate warnings of the health consequences of cigarette smoking." App. 85-86.

Petitioner's claims are preempted to the extent that they rely on a state-law "requirement or prohibition.., with respect to... advertising or promotion." Thus, insofar as claims under either failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are preempted. The Act does not, however, preempt petitioner's claims that rely solely on respondents' *[505* U.S. 504, 525] testing or research practices or other actions unrelated to advertising or promotion.

Breach of Express Warranty

Petitioner's claim for breach of an express warranty arises under N.J. Stat. Ann. 12A: 2-3 13(l)(a) (West 1962), which provides:

"Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."

Petitioner's evidence of an express warranty consists largely of statements made in respondents' advertising. See 893 F.2d, at 574, 576; 683 F. Supp. 1487, 1497 (N.J. 1988). Applying the Court of Appeals' ruling that Congress preempted "damage[s] actions.., that challenge.., the propriety of a party's actions with respect to the advertising and promotion of cigarettes," 789 F.2d, at 187, the District Court ruled that this claim "inevitably brings

into question [respondents'] advertising and promotional activities, and is therefore preempted" after 1965. 649 F. Supp., at 675. As demonstrated above, however, the 1969 Act does not sweep so broadly: The appropriate inquiry is not whether a claim challenges the "propriety" of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion.

A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirement[s]" imposed by an express warranty claim are not "imposed under State law," but rather imposed by the warrantor 23 If for example, a [505 U.S. 504, 526] manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be "imposed under state law," but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular "requirement.., based on smoking and health.., with respect to the advertising or promotion [of] cigarettes" in an express warranty claim arises from the manufacturer's statements in its advertisements. In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a "requirement.., imposed under State law" within the meaning of *5(b).* 24

That the terms of the warranty may have been set forth in advertisements, rather than in separate documents, is irrelevant to the preemption issue (though possibly not to the state-law issue of whether the alleged warranty is valid and enforceable), because, although the breach of warranty claim is made "with respect to... advertising," it does not rest on a duty imposed under state law. Accordingly, to the extent that petitioner has a viable claim for breach of express [505 U.S. 504, 527] warranties made by respondents, that claim is not preempted by the 1969 Act.

Fraudulent Misrepresentation

Petitioner alleges two theories of fraudulent misrepresentation. First, petitioner alleges that respondents, through their advertising, neutralized the effect of federally mandated warning labels. Such a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a prohibition, however, is merely the converse of a state-law requirement that warnings be included in advertising and promotional materials. Section *5(b)* of the 1969 Act preempts both requirements and prohibitions; it therefore supersedes petitioner's first fraudulent misrepresentation theory.

Regulators have long recognized the relationship between prohibitions on advertising that downplays the dangers of smoking and requirements for warnings in advertisements. For example, the FTC, in promulgating its initial trade regulation rule in 1964, criticized advertising that "associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness., at the same time suggesting that smoking is an activity at least consistent with physical health and well-being." The Commission concluded:

"To avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves." 29 Fed. Reg. 8356 (1964).

Longstanding regulations of the Food and Drug Administration express a similar understanding of the relationship between required warnings and advertising that "negates or disclaims" those warnings: "A hazardous substance shall not be deemed to have met [federal labeling] requirements if [505 U.S. 504, 528] there appears

in or on the label... statements, designs, or other graphic material that in any manner negates or disclaims [the required warning]." 21 CFR 191.102 *(1965)*. In this light, it seems quite clear that petitioner's first theory of fraudulent misrepresentation is inextricably related to petitioner's first failure-to-warn theory, a theory that we have already concluded is largely preempted by 5(b).

Petitioner's second theory, as construed by the District Court, alleges intentional fraud and misrepresentation both by "false representation of a material fact [and by] conceal[ment of] a material fact." Tr. 12727. 25 The predicate of this claim is a state-law duty not to make false statements of material fact or to conceal such facts. Our preemption analysis requires us to determine whether such a duty is the sort of requirement or prohibition proscribed by *5(b)*.

Section *5(b)* preempts only the imposition of state-law obligations "with respect to the advertising or promotion" of cigarettes. Petitioner's claims that respondents concealed material facts are therefore not preempted insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion. Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, 5(b) would not preempt a state law-claim based on a failure to fulfill that obligation.

Moreover, petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by *5(b)*. Such claims are predicated not on a duty "based on smoking and health," but rather on a more general obligation - [505 U.S. *504, 529]* the duty not to deceive. This understanding of fraud by intentional misstatement is appropriate for several reasons. First, in the 1969 Act, Congress offered no sign that it wished to insulate

cigarette manufacturers from longstanding rules governing fraud. To the contrary, both the 1965 and the 1969 Acts explicitly reserved the FTC's authority to identify and punish deceptive advertising practices - an authority that the FTC had long exercised and continues to exercise. See *5(c)* of the 1965 Act; 7(b) of the 1969 Act; see also nn. 7, 9, supra. This indicates that Congress intended the phrase "relating to smoking and health" (which was essentially unchanged by the 1969 Act) to be constmed narrowly, so as not to proscribe the regulation of deceptive advertising. 26

Moreover, this reading of "based on smoking and health" is wholly consistent with the purposes of the 1969 Act. State-law prohibitions on false statements of material fact do not create "diverse, nonuniform, and confusing" standards. Unlike state-law obligations conceming the warning necessary to render a product "reasonably safe," state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase "based on smoking and health," fairly but narrowly construed, does not encompass the more general duty not to make fraudulent statements. Accordingly, petitioner's claim based on allegedly fraudulent statements made in respondents' advertisements is not preempted by *5(b)* of the 1969 Act. 27 [505 U.S. *504,530]*

Conspiracy to Misrepresent or Conceal Material Facts

Petitioner's final claim alleges a conspiracy among respondents to misrepresent or conceal material facts conceming the health hazards of smoking. 28 The predicate duty underlying this claim is a duty not to conspire to commit fraud. For the reasons stated in our analysis of petitioner's intentional fraud claim, this duty is not preempted by 5(b), for it is not a prohibition "based on smoking and health" as that phrase is properly constmed. Accordingly, we conclude that the 1969 Act does not preempt petitioner's conspiracy claim.

VI

To summarize our holding: the 1965 Act did not preempt state-law damages actions; the 1969 Act preempts petitioner's claims based on a failure to warn and the neutralization *[505* U.S. 504, 531] of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not preempt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

The judgment of the Court of Appeals is accordingly reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Footnotes

[Footnote I ] Public Health Cigarette Smoking Act of 1969, Pub.L. 91-222, 84 Stat. 87, as amended, 15 U.S.C. 1331-1340. In 1984, Congress amended the statute to require four more explicit warnings, used on a rotating basis. See Comprehensive Smoking Education Act, Pub. L. 98474, 98 Stat. 2201. Because petitioner's claims arose before 1984, neither party relies on this later Act.

[Footnote 2 ] The Court of Appeals' analysis was initially set forth in Cipollone v. Liggett Group, Inc., 789 F.2d 181 (CA3 1986). Other federal courts have adopted a similar analysis. See Pennington v. Vistron Corp., 876 F.2d 414 (CAS 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (CA6 1988); Stephen v. American Brands, Inc., 825 F.2d 312 (CAl 11987); Palmer v. Liggett Group, Inc., 825 F.2d 620 (CAl 1987).

[Footnote 3 ] Dewey v. R. J. Reynolds Tobacco Co., 121 N. J. 69, 577 A.2d 1239 (1990) (holding that the Cigarette Act does not pre-empt plaintiffs failure-to-warn and misrepresentation claims); see also Forster v. R. J. Reynolds Tobacco Co., 437 N. W. 2d 655 (Minn. 1989) (holding that plaintiffs' claim in strict liability for unsafe design was not pre-empted; claims for misrepresentation and breach of express warranty would also not be pre-empted).

[Footnote 4 ] The court explained:

"However, the existence of the present federally mandated warning does not prevent an individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate. The court recognizes that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act. 593 F.Supp., at 1148.

[Footnote 5 ] It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby -

"(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

"(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health. 15 U.S.C. 1331 (1982 ed.).

[Footnote 6 ] We are not presented with any question concerning these claims.

[Footnote 7] See, e.g, Brown & Williamson Tobacco Corp., 56 F.T.C. 956 (1960); Liggett & Myers Tobacco Co., *55* F.T.C. 354 (1958); Philip Morris & Co., Ltd., 51 F.T.C. 857 *(1955);* R.J. Reynolds Tobacco Co., 48 F.T.C. 682 *(1952);* London Tobacco Co., 36 F.T.C. 282 (1943).

[Footnote 8 ] Pub.L. 89-92, 79 Stat. 282, as amended, 15 U.S.C. 1331-1340.

[Footnote 9 ] However, *5(c)* of the Act expressly preserved the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes. 79 Stat. 283.

r Footnote 10 1 See n. *5,* supra.

~ Footnote 11] For example, the California State Senate passed a total ban on both print and electronic cigarette

advertisements. "California Senate Votes Ban On Cigarette Advertising," Washington Post, June 26, 1969, p. A9. [Footnote 12 1 Pub.L. 91-222, 84 Stat. 87, *as* amended, 15 U.S.C. 1331-1340.

r Footnote 13 1 In its express preemption analysis. the court did not distinguish between the preemption provisions of the

1965 and 1969 Acts; it relied solely on the latter, apparently believing that the 1969 provision was at least as *[505* U.S.

504,517] broad as the 1965 provision. The COUP'S ultimate ruling that petitioner's claims were impliedly preempted

effective January 1, 1966, reflects the fact that the 1969 Act did not alter the statement of purpose in 2, which was

critical to the court's implied preemption analysis.

~ Footnote 14] Pub.L. *99-252,* 100 Stat. 30, as codified, 15 U.S.C. 4401-4408.

[Footnote 15 ] Cf. Banzhafv. FCC, 132 U.S. App. D.C. 14, *405* F.2d 1082 (1968), cert. denied, 396 U.S. 842 (1969) (holding that 1965 Act did not preempt FCC's fairness policy as applied to cigarette advertising).

[Footnote 16 1 JUSTICE SCALIA takes issue with our narrow reading of the phrase "No statement." His criticism, however, relies solely on an interpretation of those two words, artificially severed from both textual and legislative context. As demonstrated above, the phrase "No statement" in 5(b) refers to the similar phrase in 5(a), which refers in turn to 4, which itself sets forth a particular statement. This context, combined with the regulatory setting in which Congress acted, establishes that a narrow reading of the phrase "No statement" is appropriate.

[Footnote 17 1 This interpretation of the 1965 Act appears to be consistent with respondents' contemporaneous understanding of the Act. Although respondents have participated in a great deal of litigation relating to cigarette use beginning in the 1950's, it appears that this case is the first in which they have raised 5 as a preemption defense.

[Footnote 18 ] See Brief for Petitioner 23-24; Brief for Respondents 21-23.

r Footnote 19 ] As noted above, the 1965 Act's statement of purpose (2) suggested that Congress was concerned primarily with "regulations" - positive enactments, rather than common-law damages actions.

Although the 1969 Act did not amend 2, we are not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to 5(b).

II Footnote 20 1 Brief for Petitioner 20.

[Footnote 21] Brief for Respondents 14.

I Footnote 22 1 Petitioner makes much of the fact that congress did not expressly include common law within *5's* preemptive reach, as it has in other statutes. See, e.g., 29 U.S.C. 1 144(c)(1); 12 U.S.C. 1715z-17(d). Respondents make much of the fact that congress did not include a saving clause preserving common-law claims, again, as it has in other statutes. See, e.g., 17 U.S.C. 301. Under our analysis of *5*, these omissions make perfect sense: Congress was neither preempting nor saving common law *[505* U.S. *504, 524]* as a whole - it was simply preempthg particular common-law claims, while saving others.

r Footnote 23 1 Thus it is that express warranty claims are said to sound in contract, rather than in tort. Compare Black's

Law Dictionary 1489 (6th ed. 1990) (defining "tort': "There must always be a violation of some du~... arid *[505* U.S. *504,*

*526]* generally such duty must arise by operation of law and not by mere agreement of the parties") with id., at 322

(defining "contract": "An agreement between ~o... persons which creates an obligation").

[Footnote 24 ] JUSTICE SCALIA contends that, because the general duty to honor express warranties arises under state law, every express warranty obligation is a "requ~ement... imposed under State law," and that, therefore, the Act preempts petitioner's express warranty claim. JUSTICE SCALIA might be correct if the Act preempted "liability" imposed under state law (as he suggests, post, at *551);* but, instead, the Act expressly preempts only a "requirement or prohibition" imposed under state law. That a "contract has no legal force apart from the [state] law that acknowledges its binding character," Norfolk & Western R. Co. v. Train Dispatchers, 4.% .5. 117 130 (1991), does not mean that every contractual provision is "imposed under State law." To the contrary, common understanding dictates that a contractual requirement, although only enforceable under state law, is not "imposed" by the State, but rather is "imposed" by the contracting party upon itself

[Footnote 25 ] The District Court stated that this claim "consists of the following elements: 1) a material misrepresentation of... fact [by false

statement or concealment]; 2) knowledge of the falsity... ; 3) intent that the misrepresentation be relied upon; 4) justifiable reliance... ; *5)* resultant damage." 683 F.Supp. 1487, 1499 (N.J. 1988).

[Footnote 26 ] The Senate Report emphasized that the "preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health. It would in no way affect the power of any State... with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations." S. Rep. No. 91-566, p. 12(1969) (emphasis supplied).

[Footnote 27 ] Both JUSTICE BLACKMUN and JUSTICE SCALIA challenge the level of generality employed in our analysis. JUSTICE BLACKMUN contends that, as a matter of consistency, we should constme failure-to-warn claims not *[505* U.S. 504.530] as based on smoking and health, but rather as based on the broader duty "to inform consumers of known risks." Post, at 543. JUSTICE SCALIA contends that, again as a matter of consistency, we should constme fraudulent misrepresentation claims not as based on a general duty not to deceive, but rather as "based on smoking and health." Admittedly, each of these positions has some conceptual attraction. However, our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose.

To analyze failure-to-warn claims at the highest level of generality (as JUSTICE BLACKMUN would have us do) would render the 1969 amendments almost meaningless, and would pay too little respect to Congress' substantial reworking of the Act. On the other hand, to analyze fraud claims at the lowest level of generality (as JUSTICE SCALIA would have us do) would conflict both with the background presumption against pre-emption and with legislative history that plainly expresses an intent to preserve the "police regulations" of the States. See n. 25, supra.

[Footnote 28] The District Court described the evidence of conspiracy as follows:

"Evidence presented by [petitioner], particularly that contained in the documents of [respondents] themselves, indicates.., that the industry of which these [respondents] were and are a part entered into a sophisticated conspiracy. The conspiracy was organized to refute, undermine, and neutralize information coming from the scientific and medical ..... 683 F.Supp., at 1490.

JUSTICE BLACKMUN, with whom JUSTICE KENNEDY and JUSTICE SOUTER join, concurring in part, concurring

in the judgment in part, and dissenting in part.

I

The Court today would craft a compromise position concerning the extent to which federal law preempts persons injured by cigarette manufacturers' unlawful conduct from bringing state common law damages claims against those manufacturers. I, however, find the Court's divided holding with respect to the original and amended versions of the federal statute entirely unsatisfactory. Our precedents do not allow us to infer a scope of preemption beyond that which clearly is mandated by Congress' language. In my view, neither version of the federal legislation at issue here provides the kind of unambiguous evidence of congressional intent necessary to displace state common law damages claims. I therefore join Parts I, II, III, and IV of the Court's opinion, but dissent from Parts V and VI.

A

I agree with the Court's exposition, in Part III of its opinion, of the underlying principles of preemption law, and in particular with its recognition that the preemptive scope of the Federal Cigarette Labeling and Advertising Act (1965 Act or Act) and the Public Health Cigarette Smoking Act of *[505* U.s. *504,* 532] 1969 (1969 Act) is "governed entirely by the express language" of the statutes' preemption provisions. Ante, at 517. Where, as here, Congress has included in legislation a specific provision addressing - and indeed, entitled - preemption, the Court's task is one of statutory interpretation - only to "identify the domain expressly preempted" by the provision. Ibid. An interpreting court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990), (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189. 194 *(1985)).* See Califomia

Coastal Comm'n. v. Granite Rock Co., 480 U.S. 572, 591-593 (1987); Califomia Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272. 282 (1987) (opinion of Marshall, 1.). We resort to principles of implied preemption - that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law, see English v. General Electric Co., 496 U.S. 72, 79 (1990) - only when Congress has been silent with respect to pre-emption.

I further agree with the Court that we cannot find the state common law damages claims at issue in this case preempted by federal law in the absence of clear and unambiguous evidence that Congress intended that result. See ante, at 516. The Court describes this reluctance to infer preemption in ambiguous cases as a "presumption against the preemption of state police power regulations." Ante, at 518. Although many of the cases in which the Court has invoked such a presumption against displacement of state law have involved implied preemption, see, e.g., Florida Lime Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 -152 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 - 237 (1947), this Court often speaks in general terms without reference to the nature of the preemption at issue in the given statutory scheme. See, e.g., Maryland v. Louisiana, *[505* U.s. 504, 533] 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); Avocado Growers, 373 U. S., at 146 - 147 ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute... in the absence of an unambiguous congressional mandate to that effect"); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States") (opinion of Frankfurter, J.).

The principles of federalism and respect for state

sovereignty that underlie the Court's reluctance to find preemption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not whether Congress intended to preempt state regulation, but to what extent. We do not, absent unambiguous evidence, infer a scope of preemption beyond that which clearly is mandated by Congress' language. 11 therefore agree with the Court's unwillingness to conclude that the state common law damages claims at issue in this case are preempted unless such result is "'the clear and manifest purpose of Congress."' Ante, at 516 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S.. at 230).

B

I also agree with the Court's application of the foregoing principles in Part IV of its opinion, where it concludes that [505 U.S. 504.534] none of petitioner's common law damages claims are preempted by the 1965 Act. In my view, the words of *5(b)* of that Act ("No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act") can bear only one meaning: that States are prohibited merely from "mandating particular cautionary statements.., in cigarette advertisements." Ante, at 518. As the Court recognizes, this interpretation comports with Congress' stated purpose of avoiding "'diverse, nonuniform, and confusing cigarette labeling and advertising regulations"' relating to smoking and health. Ante, at 519 (quoting 15 U.S.C. 1331(2)). The narrow scope of federal preemption is thus apparent from the statutory text, and it is correspondingly impossible to divine any "clear and manifest purpose" on the part of Congress to preempt common law damages actions.

II

My agreement with the Court ceases at this point. Given the Court's proper analytical focus on the scope of the

express preemption provisions at issue here and its acknowledgment that the 1965 Act does not preempt state common law damages claims, I find the Court's plurality's conclusion that the 1969 Act preempts at least some common law damages claims little short of baffling. In my view, the modified language of *5(b)*, *15* U.S.C. 1334(b) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act"), no more "clearly" or "manifestly" exhibits an intent to preempt state common law damages actions than did the language of its predecessor in the 1965 Act. Nonetheless, the plurality reaches a different conclusion, and its reasoning warrants scrutiny. [505 U.S. 504, *535]*

A

The plurality premises its preemption ruling on what it terms the "substantial changes" wrought by Congress in *5(b)*, ante, at *520*, notably, the rewording of the provision to preempt any "requirement or prohibition" (as opposed merely to any "statement") "imposed under State law." As an initial matter, I do not disagree with the plurality that the phrase "State law," in an appropriate case, can encompass the common law as well as positive enactments such as statutes and regulations. See ante, at *522-523*. I do disagree, however, with the plurality's conclusion that "State law" as used in *5(b)* represents such an all-inclusive reference. Congress' intention in selecting that phrase cannot be understood without considering the narrow range of actions - any "requirement or prohibition" - that Congress specifically described in *5(b)* as "imposed under" state law. See United States v. Morton, 467 U.S. 822, 828 (1984) ("We do not.., construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase" (footnote omitted)); Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307 (1961) ("The maxim noscitur a sociis, that a word is known by the company it keeps,

while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to the Acts of Congress"); see also Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117. 138 -139 (1991) (STEVENS, J., dissenting) (declining to read the phrase "all other law, including State and municipal law," broadly).

Although the plurality flatly states that the phrase "no requirement or prohibition""sweeps broadly" and "easily encompass[es] obligations that take the form of common-law rules," ante, at 521, those words are in reality far from unambiguous, and cannot be said clearly to evidence a congressional mandate to preempt state common law damages actions. The dictionary definitions of these terms suggest, if [505 U.S. 504,536] anything, specific actions mandated or disallowed by a formal goveming authority. See, e.g., Webster's Third New International Dictionary 1929 (1981) (defining "require" as "to ask for authoritatively or imperatively: claim by right and authority" and "to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)"); Black's Law Dictionary 1212 (6th ed. 1990) (defining "prohibition" as an "[a]ct or law prohibiting something"; an "interdiction").

More important, the question whether common law damages actions exert a regulatory effect on manufacturers analogous to that of positive enactments - an assumption crucial to the plurality's conclusion that the phrase "requirement or prohibition" encompasses common-law actions - is significantly more complicated than the plurality's brief quotation from San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 *(1959)*, see ante, at 521, would suggest.

The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages, by its very nature, attaches additional consequences to the manufacturer's continued unlawful conduct, no particular

course of action (e.g., the adoption of a new warning label) is required. A manufacturer found liable on, for example, a failure-to-warn claim may respond in a number of ways. It may decide to accept damages awards as a cost of doing business, and not alter its behavior in any way. See Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 -186 (1988) (corporation "may choose to disregard [state] safety regulations and simply pay an additional" damages award if an employee is injured as a result of a safety violation). Or, by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs. The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments [505 U.s. 504, 537] such as statutes and administrative regulations. See Dewey v. R. J. Reynolds Tobacco Co., 121 N.J. 69, 90, 577 A.2d 1239, 1249 (1990); Garner, Cigarette Dependency

and Civil Liability: A Modest Proposal, 53 S. Cal. L. Rev. 1423, 1454 (1980). Moreover, tort law has an entirely separate function - compensating victims - that sets it apart from direct forms of regulation. See Ferebee v. Chevron Chemical Co., 237 U.S. App. D.C. 164, 175, 736 F.2d *1529*, 1540, cert. denied, 469 U.S. 1062 (1984).

Despite its earlier acknowledgment, consistent with the foregoing conception of damages actions, that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions," ante at 518 2 the plurality apparently finds Garmon's statement that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief," 359 U.S., at 247, sufficient authority to warrant extinguishing the common-law actions at issue in this case. See ante, at 521.1 am not persuaded. Not only has the Court previously distinguished Gannon 3 but it has declined on several recent occasions to find the regulatory

effects of state tort law direct or substantial enough to warrant pre-emption.

In Goodyear Atomic Corp. v. Miller, for example, the Court distinguished, for purposes of pre-emption analysis, [505 U.s. 504,538] "direct state regulation" of safety matters from "the incidental regulatory effects" of damages awarded pursuant to a state workers' compensation law. 486 U.S., at 185 . Relying in part on its earlier decision in Silkwood v. Kerr McGee Corp., 464 U.S. 238, 256 (1984), 4 the Court stated that Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not. 486 U.S., at 186 . Even more recently, the Court declined in English v. General Electric Co., 496 U.S.. at 86 , to find state common law damages claims for emotional distress preempted by federal nuclear energy law. The Court concluded that, although awards to former employees for emotional distress would attach "additional consequences" to retaliatory employer conduct, and could lead employers to alter the underlying conditions about which employees were complaining, ibid., such an effect would be "neither direct nor substantial enough" to warrant preemption. Id., at 85.

In light of the recognized distinction in this Court's jurisprudence between direct state regulation and the indirect regulatory effects of common law damages actions, it cannot be said that damages claims are clearly or unambiguously "requirements" or "prohibitions" imposed under state law. [505 U.S. 504,539] The plain language of the 1969 Act's modified preemption provision simply cannot bear the broad interpretation the plurality would impart to it.

B

Not only does the text of the revised *5(b)* fail clearly or manifestly to require preemption of state common law damages actions, but there is no suggestion in the

legislative history that Congress intended to expand the scope of the preemption provision when it amended the statute in 1969. The plurality acknowledges the evidence that Congress itself perceived the changes in *5(b)* to be a mere "'clarifi[cation]"' of the existing narrow preemption provision, ante, at 520 (quoting S. Rep. No. 9 1-566, p. 12 (1969) (hereinafter S. Rep.)), but it dismisses these statements of legislative intent as the "'views of a subsequent Congress."' Ante, at 520 (quoting United States v. Price, 361 U.S. 304,313(1960)). The plurality is wrong not only as a factual matter - for the statements of the Congress that amended *5(b)* are contemporaneous, not "subsequent," to enactment of the revised preemption provision - but as a legal matter, as well. This Court accords "great weight" to an amending Congress' interpretation of the underlying statute. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 -381 and n. 8 (1969).

Viewing the revisions to *5(b)* as generally nonsubstantive in nature makes sense. By replacing the word "statement" with the slightly broader term, "requirement," and adding the word "prohibition" to ensure that a State could not do through negative mandate (e.g., banning all cigarette advertising) that which it already was forbidden to do through positive mandate (e.g., mandating particular cautionary statements), Congress sought to "clarify]" the existing *[505* U.S. 504, 540] precautions against confusing and nonuniform state laws and regulations. S. Rep. at 12. *5*

Just as it acknowledges the evidence that Congress' changes in the preemption provision were nonsubstantive, the plurality admits that "portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities." Ante, at 521. Indeed, the relevant Senate report explains that the revised preemption provision is "intended to include not only action by State statute, but by all other administrative actions or local ordinances or regulations by any political subdivisions of any State," a

list remarkable for the absence of any reference to common law damages actions. S. Rep. at 12. Cf. e.g., 29 U.S.C. 1144(a) and (c)(1) (ERISA statute defines "any and all State laws" as used in preemption provision to mean "all laws, decisions, rules, regulations, or other State action having the effect of law") (emphasis added). The plurality dismisses this statement with the simple observation that "the language of the Act plainly reaches beyond such [positive] enactments." Ante, at 521. Yet, as discussed above, the words of *5(b)* ("requirement or prohibition") do not so "plainly" extend to common law damages actions, and the plurality errs in placing so much weight on this fragile textual hook.

The plurality further acknowledges that, at the same time that Congress amended the preemption provision of *5(b)*, it made no effort to alter the statement of purpose contained in 2 of the 1965 Act. Ante, at 521, n.19. Although the [505 U.S. 504.541] plurality relegates this fact to a footnote, the continued vitality of 2 is significant, particularly in light of the Court's reliance on the same statement of purpose for its earlier conclusion that the 1965 Act does not preempt state common law damages actions. See ante, at 519 (concluding that Congress' expressed intent to avoid diverse, nonuniform, and confusing regulations "most naturally refers to positive enactments by [state legislatures and federal agencies], not to common-law damages actions").

Finally, there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies; yet that is the regrettable effect of the ruling today that many state common law damages claims are preempted. The Court in the past has hesitated to find preemption where federal law provides no comparable remedy. See Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 869 (1992) (noting the "rather strong tradition of federal deference to competing state interests in

compensating injury victims"). Indeed, in Silkwood, the Court took note of "Congress' failure to provide any federal remedy" for injured persons, and stated that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S., at 251 . See also id., at 263 (BLACKMUN, J., dissenting) ("[I]t is inconceivable that Congress intended to leave victims with no remedy at all").

Unlike other federal statutes where Congress has eased the bite of preemption by establishing "comprehensive" civil enforcement schemes, see, e.g., Ingersoll-Rand Co. v. McClendon, 498 U.S. 133. 144 -145 (1990) (discussing 502(a) of ERISA), the Cigarette Labeling and Advertising Act is barren of alternative remedies. The Act merely empowers the Federal Trade Commission to regulate unfair or deceptive advertising practices (*15* U.S.C. 1336), establishes minimal *[505* U.S. 504, 542] criminal penalties (misdemeanor and fine not to exceed $10,000) for violations of the Act's provisions ( 1338), and authorizes federal courts, upon the Government's application, to enjoin violations of the Act (1339). Unlike the plurality, I am unwilling to believe that Congress, without any mention of state common law damages actions or of its intention dramatically to expand the scope of federal preemption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct.

Thus, not only does the plain language of the 1969 Act fail clearly to require preemption of petitioner's state common law damages claims, but there is no suggestion in the legislative history that Congress intended to expand the scope of the preemption provision in the drastic manner that the plurality attributes to it. Our obligation to infer preemption only where Congress' intent is clear and manifest mandates the conclusion that state common law damages actions are not preempted by the 1969 Act. 6

III

Stepping back from the specifics of the plurality's preemption analysis to view the result the plurality ultimately reaches, I am further disturbed. Notwithstanding the Court's ready acknowledgment that "' "[t]he purpose of Congress is the ultimate touchstone"' of preemption analysis," ante, at 516 (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)), the plurality proceeds to create a crazy quilt of *[505* U.S. 504, 543] pre-emption from among the common law claims implicated in this case, and, in so doing, reaches a result that Congress surely could not have intended.

The most obvious problem with the plurality's analysis is its frequent shift in the level of generality at which it examines the individual claims. For example, the plurality's states that fraudulent misrepresentation claims (at least those involving false statements of material fact in advertisements) are "predicated not on a duty 'based on smoking and health,' but rather on a more general obligation - the duty not to deceive," and therefore are not preempted by 5(b) of the 1969 Act. Ante, at 528-529. Yet failure-to-warn claims - which could just as easily be described as based on a "more general obligation" to inform consumers of known risks - implicitly are found to be "based on smoking and health," and are declared preempted. See ante, at 524. The plurality goes on to hold that express warranty claims are not preempted because the duty at issue is undertaken by the manufacturer, and is not "imposed under State law." Ante, at 525. Yet, as the plurality itself must acknowledge, "the general duty not to breach warranties arises under state law," ibid. (emphasis added); absent the State's decision to penalize such behavior through the creation of a common law damages action, no warranty claim would exist.

In short, I can perceive no principled basis for many of the plurality's asserted distinctions among the common-law claims, and I cannot believe that Congress intended to

create such a hodgepodge of allowed and disallowed claims when it amended the preemption provision in 1970. Although the plurality acknowledges that 5(b) fails to "indicate that any familiar subdivision of common-law claims is or is not preempted," ante, at 523, it ignores the simplest and most obvious explanation for the statutory silence: that Congress never intended to displace state common-law damages claims, much less to cull through them in the manner the plurality does today. I can only speculate as to the difficulty *[505* U.S. *504,* 544] lower courts will encounter in attempting to implement today's decision.

IV

By finding federal preemption of certain state common law damages claims, the decision today eliminates a critical component of the States' traditional ability to protect the health and safety of their citizens. Yet such a radical readjustment of federal-state relations is warranted under this Court's precedents only if there is clear evidence that Congress intended that result. Because I believe that neither version of the Federal Cigarette Labeling and Advertising Act evidences such a clear congressional intent to preempt state common law damages actions, I respectfully dissent from Parts V and VI of the JUSTICE STEVENS' opinion.

[Footnote 1] The Court construes congressional inroads on state power narrowly in other contexts, as well. For example, the Court repeatedly has held that, in order to waive a State's sovereign immunity from suit in federal court, Congress must make its intention "unmistakably clear in the language of the statute." Atascadero State Hospital v. Scanlon, 473 U.S. 234. 242 (1985); Dellmuthv. Muth, 491 U.S. 223. 228 (1989).

[Footnote 2 ] Congress, in fact, has expressly allowed common law damages actions to survive while preempting other, more direct forms of state regulation. See, e.g., Comprehensive Smokeless Tobacco Health Education Act of 1986, 7, 100 Stat. 34, 15 U.S.C. 4406; Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 et seq., as construed in Cade v. National Solid Wastes Management Assn., ante, p. 88.

[Footnote 3] The Court has explained that Garmon, in which a state common law damages award was found to be preempted by the National Labor Relations Act, involved a special "presumption of federal preemption" relating to the primary jurisdiction of the National Labor Relations Board. See Brown v. Hotel Employees, 468 U.S. 491, 502 (1984); Englishv. General Electric Co., 496 U.S. 72, 86 -87, n. 8 (1990).

[Footnote 4 ] The Court in Silkwood declined to find state punitive damages awards preempted by federal nuclear safety laws, explaining: "It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept." U.S at 256 Although the Court has noted that the decision in Silkwood was based in "substantial part" on affirmative evidence in the legislative history suggesting that Congress did not intend to include common law damages remedies within the preempted field, see English v. General Electric Co., 4.% 2.S.A 86., 72 (1990), Silkwood's discussion of the regulatory effects of the common law is instructive, and has been relied on in subsequent cases. See, e.g., Goodyear, 486 U.S., at

186.

Footnote 5 ] In the one reported case construing the scope of preemption under the 1965 Act, Banzhaf v. FCC - a case of which Congress was aware, see S. Rep. at 7 - the Court of Appeals for the District of Columbia Circuit used the term "affirmative requirements" to describe 5(b)'s ban on "statement[s]." 132 U.S. App. D.C. 22,405 F.2d 1082, 1090 (1968), cert. denied sub nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969). It is but a small step from "affirmative requirement" to the converse, "negative requirement" ("prohibition"), and from there to the single explanatory phrase "requirement or prohibition."

[Footnote 6 ] Every Court of Appeals to consider the question, including the Third Circuit in an earlier opinion in this case, similarly has concluded that state common law damages claims are not expressly preempted under the 1969 Act. See, e.g., Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185-186 (CA3 1986), cert. denied, 479 U.S. 1043 (1987); Pennington v. Vistron Corp., 876 F.2d 414,418 (CAS 1989); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 234 (CA6 1988); Palmer v. Liggett Group, Inc., 825 F.2d 620, 625 (CAl 1987). See also Dewey v. R. J. Reynolds Tobacco Co., 121 N.J. 69, 85, 577 A.2d 1239, 1247 (1990); Forster v. R. J. Reynolds Tobacco Co., 437 N.W.2d 655, 658 (Mm. 1989).

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,

concurring in the judgment in part and dissenting in part.

Today's decision announces what, on its face, is an extraordinary and unprecedented principle of federal statutory construction: that express preemption provisions must be construed narrowly, "in light of the presumption against the preemption of state police power regulations." Ante, at 518. The life span of this new rule may have been blessedly brief, inasmuch as the opinion that gives it birth in Part I proceeds to ignore it in Part V by adjudging at least some of the common law tort claims at issue here preempted. In my view, there is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, our job is to interpret Congress's decrees of preemption neither narrowly nor broadly, but in accordance with their apparent meaning. If we did that job in the present case, we would find, under the 1965 Act, preemption of the petitioner's failure-to-warn claims; and, under the 1969 Act, we would find preemption of the petitioner's claims complete. [505 U.S. 504, *545]*

I

The Court's threshold description of the law of preemption is accurate enough: though we generally "assum[e] that the historic police powers of the States [are] not to be superseded by... Federal Act unless that [is] the clear and manifest purpose of Congress," ante, at 516 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218. 230 (1947)), we have traditionally not thought that to require express statutory text. Where state law is in actual conflict with federal law, see, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204 (1983), or where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52. 67 (1941), or even where the nature of Congress' regulation, or its scope, convinces us that "Congress left no room for the States to supplement

it," Rice, supra, at 230, we have had no difficulty declaring that state law must yield. The ultimate question in each case, as we have framed the inquiry, is one of Congress's intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved. See, e.g., English v. General Electric Co., 496 U.S. 72, 78 -79 (1990); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

The Court goes beyond these traditional principles, however, to announce two new ones. First, it says that express preemption provisions must be given the narrowest possible construction. This is, in its view, the consequence of our oft-repeated assumption that, absent convincing evidence of statutory intent to preempt, "'the historic police powers of the States [are] not to be superseded,"' see ante, at 516. But it seems to me that assumption dissolves once there is conclusive evidence of intent to preempt in the express words of the statute itself, and the only remaining question is what the scope of that preemption is meant to be. Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction. *[505* U.S. 504, *546]*

That is precisely what our express preemption cases have done. Less than a month ago, in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), we held that the Airline Deregulation Act's provision preempting state laws "relating to [airline] rates, routes, or services," 49 U.S.C. App. 1 305(a)(1), was broad enough to reach state fare advertising regulations despite the availability of plausible limiting constructions. We made no mention of any "plain-statement" rule, or rule of narrow construction, but applied the usual "' "assumption that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose."'" Morales, supra, at 383 (quoting FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990)) (emphasis added). And last Term, in Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991), we interpreted an express pre-emption provision broadly despite the fact that a well-respected canon of statutory construction

supported a narrower reading. See id., at 129; id., at 136 (STEVENS, J., dissenting). We said not a word about a "presumption against... pre-emption," ante, at 518, that was to be applied to construction of the text.

In light of our willingness to find preemption in the absence of any explicit statement of preemptive intent, the notion that such explicit statements, where they exist, are subject to a "plain-statement" rule is more than somewhat odd. To be sure, our jurisprudence abounds with rules of "plain statement," "clear statement," and "narrow construction" designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated, or seemingly inequitable doctrines applied. See, e.g., United States v. Mitchell, 445 U.S. 535. 538 (1980) (waivers of federal sovereign immunity must be "unequivocally expressed"); Will v. Michigan Dept. of State Police, 491 U.S. 58. 65 (1989) (clear statement required to compel States to entertain damages suits against themselves in state *[505* U.S. 504. *547]* courts); Atascadero State Hospital v. Scanlon, 473 U.S. 234. 243 (1985) (abrogation of state sovereign immunity must be expressed "in unmistakable language"). But none of those rules exists alongside a doctrine whereby the same result so prophylactically protected from careless explicit provision can be achieved by sheer implication, with no express statement of intent at all. That is the novel regime the Court constructs today.

The results seem odder still when one takes into account the second new rule that the Court announces: "When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue,... we need only identify the domain expressly preempted by [that provision]." Ante, at 517. Once there is an express preemption provision, in other words, all doctrines of implied preemption are eliminated. This proposition may be correct insofar as implied "field" preemption is concerned: the existence of an express

preemption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines. However, with regard to implied "conflict" preemption - i.e., where state regulation actually conflicts with federal law, or where state regulation "stands as an obstacle to the accomplishment and execution" of Congress's purposes, Hines, supra, at 67- the Court's second new rule works mischief If taken seriously, it would mean, for example, that, if a federal consumer protection law provided that no state agency or court shall assert jurisdiction under state law over any workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (e.g., consumer protection) could impose requirements entirely contrary to federal law - forbidding, for example, the use of certain safety equipment that federal law requires. To my knowledge, we have never expressed such a rule before, and our prior cases are inconsistent [505 U.S. 504, 548] with it. See, e.g., Jones v. Rath Packing Co., 430 U.S. 519. 540 -543 (1977). When this second novelty is combined with the first, the result is extraordinary: the statute that says anything about preemption must say everything; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of congresses will dare to say anything about preemption.

The proper rule of construction for express preemption provisions is, it seems to me, the one that is customary for statutory provisions in general: their language should be given its ordinary meaning. FMC Corp. v. Holliday, supra, at 57; Shaw v. Delta Air Lines, 463 U.S.. at 97 . When this suggests that the preemption provision was intended to sweep broadly, our construction must sweep broadly as well. See, e.g., id., at 96-97. And when it bespeaks a narrow scope of preemption, so must our judgment. See, e.g., Fort Halifax Packing Co. v. Coyne, 45~IL?1 -8(1987). Applying its niggardly rule of construction, the Court finds (not

surprisingly) that none of petitioner's claims - common law failure to warn, breach of express warranty, and intentional fraud and misrepresentation - is preempted under 5(b) of the 1965 Act. And save for the failure-to-warn claims, the Court reaches the same result under 5(b) of the 1969 Act. I think most of that is error. Applying ordinary principles of statutory construction, I believe petitioner's failure-to-warn claims are preempted by the 1965 Act, and all his common-law claims by the 1969 Act.

II

With much of what the plurality says in Part V of its opinion I agree - that "the language of the 1969. Act plainly reaches beyond [positive] enactments," ante, at 521; that the general tort law duties petitioner invokes against the cigarette companies can, as a general matter, impose "requirement[s] or prohibition[s]" within the meaning of 5(b) of the [505 U.S. *504,549]* 1969 Act, ibid.; and that the phrase "State law," as used in that provision, embraces state common law, ante, at

523. I take issue with the plurality, however, on its application of these general principles to the present case. Its finding that they produce only partial preemption of petitioner's common law claims rests upon three misperceptions that I shall discuss in turn, under headings indicating the erroneously permitted claims to which they apply.

A

Pre-1969 Failure-to-Warn Claims

According to the Court, 1 5(b) of the 1965 Act "is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." Ante, at 518-519 (emphasis added). In essence, the Court reads 5(b)'s critical language "No statement relating to smoking and health shall be

required" to mean "No particular statement relating to smoking and health.., shall be required." The Court reasons that because common law duties do not require cigarette manufacturers to include any particular statement in their advertising, but only some statement warning of health risks, those duties survive the 1965 Act. I see no basis for this element of "particularity." To require a warning about cigarette health risks is to require a "statement relating to smoking and health." If the "presumption against.., preemption," ante, at 518, requires us to import limiting language into the 1965 Act, I do not see why it does not require us to import similarly limiting language into the 1969 Act - so that a "requirement... based on smoking and health.., with respect to advertising" means only a specific requirement, and not just general, non cigarette-specific duties imposed by tort law. The divergent treatment of the 1965 Act cannot be *[505* U.S. 504, *550]* justified by the Act's statement of purposes, which, as the Court notes, expresses concern with "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. 1331(2) (emphasis added). That statement of purposes was left untouched by Congress in 1969, and thus should be as restrictive of the scope of the later 5(b) as the Court believes it is of the scope of the earlier one. 2

To the extent petitioner's claims are premised specifically on respondents' failure (during the period in which the 1965 Act was in force) to include in their advertising any statement relating to smoking and health, I would find those claims, no less than the similar post-1969 claims, preempted. In addition, for reasons I shall later explain, see Part III, infra, I would find preemption even of those claims based on respondents' failure to make health-related statements to consumers outside their advertising. However, since 5(b) of the 1965 Act enjoins only those laws that require "statement[s]" in cigarette advertising, those of petitioner's claims that, if accepted, would penalize statements voluntarily made by the cigarette companies must be deemed to survive. As these would appear to

include petitioner's breach-of-express-warranty and intentional fraud and misrepresentation claims, I concur in the Court's judgment in this respect. *[505*

U.S. 504, 551]

B

Post-1969 Breach-of-Express-Warranty Claims

In the context of this case, petitioner's breach-of-express-warranty claim necessarily embodies an assertion that respondents' advertising and promotional materials made statements to the effect that cigarette smoking is not unhealthy. Making such statements civilly actionable certainly constitutes an advertising "requirement or prohibition.., based on smoking and health." The plurality appears to accept this, but finds that liability for breach of express warranty is not "imposed under State law" within the meaning of 5(b) of the 1969 Act. "[R]ather," it says, the duty "is best understood as undertaken by the manufacturer itself" Ante, at 526. I cannot agree.

When liability attaches to a particular promise or representation, it attaches by law. For the making of a voluntary promise or representation, no less than for the commission of an intentional tort, it is the background law against which the act occurs, and not the act itself, that supplies the element of legal obligation. See Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 429 (1934); N. J. Stat. Ann. 12A:2-313(1), 12A:2-714, and 12A:2-715 (West 1962) (providing for enforcement of express warranties). Of course, New Jersey's law of express warranty attaches legal consequences to the cigarette manufacturer's voluntary conduct in making the warranty, and in that narrow sense, I suppose, the warranty obligation can be said to be "undertaken by the manufacturer." But on that logic, it could also be said that the duty to warn about the dangers of cigarettes is undertaken voluntarily by manufacturers when they

choose to sell in New Jersey; or, more generally, that any legal duty imposed on volitional behavior is not one imposed by law.

The plurality cites no authority for its curious view, which is reason enough to doubt it. In addition, however, we rejected this very argument last Term in Norfolk & Western *[505 U.S. 504, 552]* R. Co. v. Train Dispatchers, where we construed a federal exemption "from the antitrust laws and from all other law," 49 U.S.C. 11341(a), to include an exemption from contract obligations. We observed, in a passage flatly inconsistent with the plurality's analysis today, that "[a] contract has no legal force apart from the law that acknowledges its binding character." 499 U.S.. at 130 . Cf. id., at 139 (STEVENS, J., dissenting). I would find petitioner's claim for breach of express warranty preempted by 5(b) of the 1969 Act.

C

Post-1969 Fraud and Misrepresentation Claims

According to the plurality, at least one of petitioner's intentional fraud and misrepresentation claims survives 5(b) of the 1969 Act because the common law duty underlying that claim is not "based on smoking and health" within the meaning of the Act. See ante, at 528-529. If I understand the plurality's reasoning, it proceeds from the implicit assumption that only duties deriving from laws that are specifically directed to "smoking and health," or that are uniquely crafted to address the relationship between cigarette companies and their putative victims, fall within 5(b) of the Act, as amended. Given that New Jersey's tort law "duty not to deceive," ante, at 529, is a general one, applicable to all commercial actors and all kinds of commerce, it follows from this assumption that 5(b) does not preempt claims based on breaches of that duty.

This analysis is suspect, to begin with, because the

plurality is unwilling to apply it consistently. As JUSTICE BLACKMUN cogently explains, see ante, at 543 (opinion concurring in part and dissenting in part), if New Jersey's common law duty to avoid false statements of material fact - as applied to the cigarette companies' behavior - is not "based on smoking and health," the same must be said of New Jersey's common law duty to warn about a product's dangers. Each duty transcends the relationship between the cigarette companies *[505 U.S. 504, 553]* and cigarette smokers; neither duty was specifically crafted with an eye toward "smoking and health." None of the arguments the plurality advances to support its distinction between the two is persuasive. That Congress specifically preserved, in both the 1965 and 1969 Acts, the Federal Trade Commission's authority to police deceptive advertising practices, see 5(c) of the 1965 Act; 7(b) of the 1969 Act, ante, at 529, does not suggest that Congress intended comparable state authority to survive 5(b). In fact, at least in the 1965 Act (which generally excluded federal as well as state regulation), the exemption suggested that 5(b) was broad enough to reach laws governing fraud and misrepresentation. And it is not time that the States' laws governing fraud and misrepresentation in advertising impose identical legal standards, whereas their laws "concerning the warning necessary to render a product 'reasonably safe"' are quite diverse, Ibid. The question whether an ad featuring a glamorous, youthful smoker with pearly-white teeth is "misrepresentative" would almost certainly be answered differently from State to State. See ante, at 527 (discussing FTC's initial cigarette advertising rules).

Once one is forced to select a consistent methodology for evaluating whether a given legal duty is "based on smoking and health," it becomes obvious that the methodology must focus not upon the ultimate source of the duty (e.g., the common law), but upon its proximate application. Use of the "ultimate source" approach (i.e., a legal duty is not "based on smoking and health" unless the law from which it derives is directed only to smoking and

health) would gut the statute, inviting the very "diverse, nonuniform, and confusing cigarette.., advertising regulations" Congress sought to avoid. 15 U.S.C. 1331(2). And the problem is not simply the common law: requirements could be imposed by state executive agencies as well, so long as they were operating under a general statute authorizing their supervision of "commercial advertising" or "unfair trade practices." New *[505 U.S. 504, 554]* Jersey and many other States have such statutes already on the books. E.g., N.J. Stat. Ann. 56:8-1 et seq. (West 1989); N.Y.Gen.Bus.Law 349 et seq. (McKinney 1988 and Supp. 1992); Texas Bus. & Com. Code Ann. 17.01 et seq. (1987 and Supp. 1992).

I would apply to all petitioner's claims what I have called a "proximate application" methodology for determining whether they invoke duties "based on smoking and health" - I would ask, that is, whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health. On that basis, I would find petitioner's failure-to-warn and misrepresentation claims both preempted.

III

Finally, there is an additional flaw in the plurality's opinion, a systemic one that infects even its otherwise correct disposition of petitioner's post-1969 failure-to-warn claims. The opinion states that, since 5(b) proscribes only "requirement[s] or prohibition[s] ... 'with respect to... advertising or promotion,"' state law claims premised on the failure to warn consumers "through channels of communication other than advertising or promotion" are not covered. Ante, at 528 (emphasis added); see ante, at 524. This preserves not only the (somewhat fanciful) claims based on duties having no relation to the advertising and promotion (one could imagine a law requiring manufacturers to disclose the health hazards of their products to a state public health agency), but also claims based on duties that can be complied with by taking action

either within the advertising and promotional realm or elsewhere. Thus, if - as appears to be the case in New Jersey - a State's common law requires manufacturers to advise consumers of their products' dangers, but the law is indifferent as to how that requirement is met (i.e., through "advertising or promotion" or otherwise), the plurality would apparently be unprepared to find preemption as long *[505 U.S. 504, 555]* as the jury were instructed not to zero in on deficiencies in the manufacturers' advertising or promotion.

I think that is inconsistent with the law of preemption. Advertising and promotion are the normal means by which a manufacturer communicates required product warnings to prospective customers, and by far the most economical means. It is implausible that Congress meant to save cigarette companies from being compelled to convey such data to consumers through that means, only to allow them to be compelled to do so through means more onerous still. As a practical matter, such a "tell-the-consumers-any-way-you-wish" law compels manufacturers to relinquish the advertising and promotion immunity accorded them by the Act. The test for preemption in this setting should be one of practical compulsion, i.e., whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly. Cf., e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151, 173 , n. 25 (1978). Though the hypothetical law requiring disclosure to a state regulatory agency would seem to survive this test, I would have no difficulty finding that test met with respect to state laws that require the cigarette companies to meet general standards of "fair warning" regarding smoking and health.

Like JUSTICE BLACKMUN, "I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision." Ante, at 543-544 (opinion concurring in part and dissenting in part). Must express preemption provisions really be given their narrowest reasonable construction (as the Court says in Part III), or

need they not (as the plurality does in Part V)? Are courts to ignore all doctrines of implied preemption whenever the statute at issue contains an express preemption provision, as the Court says today, or are they to continue to apply them, as we have in the past? For pre-emption purposes, *[505* U.S. *504,556]* does "state law" include legal duties imposed on voluntary acts (as we held last Term in Norfolk & Western R. Co.), or does it not (as the plurality says today)? These and other questions raised by today's decision will fill the lawbooks for years to come. A disposition that raises more questions than it answers does not serve the country well.

[Footnote 1] The plurality is joined by Justices BLACKMUN, KENNEDY, and SOUTER in its analysis of the 1965 Act.

[Footnote 2 ] The Court apparently thinks that, because 4 of the Act, imposing the federal package labeling requirement, "itself sets forth a particular statement," ante, at 519, n. 16, 5(b), the advertising preemption provision must be read to proscribe only those state laws that compel the use of particular statements in advertising. Besides being a complete non sequitur, this reasoning proves too much: the similar prescription of a particular warning in the 1969 Act would likewise require us to confine the preemptive scope of that later statute to specific, prescriptive "requirement[s] or prohibition[s]" (which, I presume, would not include tort law obligations to warn consumers about product dangers). And under both the 1965 and 1969 versions of the Act, the package labeling preemption provision of 5(a), no less than the advertising preemption provision of 5(b), would have to be limited to the prescription of particular language, leaving the States free to impose general health labeling requirements. These results are obviously contrary to the Act's stated purposes. *[505* U.S. *504,557]* of 25

# EXHIBIT B

Filed 8/5/02 (Publishers: This opinion should follow the companion case, *Myers v. Philip Morris Companies, Inc.)*

**IN THE SUPREME COURT OF CALIFORNIA**

**JOSEPH NAEGELE, as Trustee, etc., et at,** )
)
Plaintiffs and Appellants, )
)
v. )
)
RJ. REYNOLDS TOBACCO COMPANY et at, )
)
Defendants and Respondents. )

S090420
Ct. App. 1/1 A084367

San Francisco County
Super. Ct. No. 992230

RICHARD DONALDSON, )
)
Plaintiff and Appellant )
)
v. )
)
R.J. REYNOLDS TOBACCO COMPANY et at, )
)

Defendants and Respondents.

Ct. App. *1/1* A084371

San Francisco County
Super. Ct. Not
*992223/992217*

Tobacco-related illnesses are a leading cause of death in this state and worldwide, and these debilitating illnesses have imposed enormous costs on tobacco users, their families, and society. (See, e.g., Health & Sat Code, § *104350,* subd. (a).) Although the risk of illness and death from tobacco use has become increasingly well known in recent decades, tobacco consumption continues to be widespread, at least in part because tobacco contains nicotine, a substance the Surgeon General of the United *States* has determined to be addictive. (U.S. Surgeon Gen. Rep., The Health Consequences of Smoking:

Nicotine Addiction (1988), <www.cdc.gov/tobacco/sgrj 988 .htm> [as of Aug. *5,* 2002].) In 1987, the California Legislature enacted former section 1714.45 of California's Civil Code1 (which we here sometimes refer to as the Immunity Statute) stating that in a product liability action a court could not require a manufacturer or seller to pay damages for injuries caused by certain products, including tobacco products, that are inherently unsafe and known to be unsafe by the ordinary consumer of that product. (Stats. 1987, ch. 1498, § 3, p. *5778* (hereafter sometimes former section 1714.45).) Ten years later, the Legislature repealed the Immunity Statute as it applied to manufacturers of tobacco products. (Stats. 1997, ch. *570,* § 1.)

In the companion case *of Myers v. Philip Morris Companies, Inc.* (Aug. *5,* 2002, *S0952* 13) __ Cal.4th *ó (Myers),* we consider how the repeal of the statutory immunity affects the liability of tobacco manufacturers for injuries caused by tobacco use before, during, and after the 10-year period during which the Immunity Statute was in effect. In *Myers,*

we hold that, because the repeal was not retroactive, the Immunity Statute continues to provide an immunity for tobacco companies in product liability actions, but only for conduct they engaged in during the 10-year period when the Immunity Statute was in effect3 The liability of tobacco companies based on their conduct outside the 10-year period is governed by general tort principles.

1 Further undesignated statutory references are to the Civil Code.

2 As in *Myers*, we use the term "immunity" rather loosely to describe the effect of a law that declares certain described conduct not to be a legal wrong or tort, and thus not a basis for liability.

Here, we are asked to decide what *forms of conduct* by tobacco companies during the 10-year immunity period come within the protection conferred by the Immunity Statute. The Court of Appeal held that as applied to liability for injuries caused by tobacco products, the Immunity Statute covers all conduct by tobacco companies acting as manufacturers or sellers of tobacco products except conduct resulting in manufacturing defects or breach of express warranty. We, however, conclude that the Immunity Statute's protection is not so broad and that it does not extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking.

## I

Plaintiff Edwin Brigham smoked cigarettes from 1950 until 1996, when he was diagnosed with lung cancer. He sued defendants RJ. Reynolds Tobacco Company and Brown & Williamson Tobacco Corporation seeking personal injury damages on theories of negligence, product liability, and fraud. Defendants demurred, citing the Immunity Statute as a bar to all of plaintiff's causes of action. The trial court sustained defendants' demurrer but granted plaintiff leave to amend the complaint.

When defendants thereafter demurred to plaintiff's first amended complaint, the trial court sustained the demurrer and dismissed plaintiff's lawsuit against defendants. On plaintiff's appeal, the Court of Appeal affirmed? We granted plaintiff's petition for review.

3 Plaintiff died while the appeal was pending, and the Court of Appeal panted the application of Joseph Naegele and others as trustees to substitute for plaintiff. For simplicity's sake, we refer to both Brigham and the trustees as plaintiff.

*II*

At issue here is what types or categories of conduct by tobacco companies fall within the immunity given to them by the Immunity Statute, which was in effect from January 1, 1988, until December 31, 1997. The statute specifies that the immunity it gives to manufacturers and sellers of specified inherently unsafe products, including tobacco, applies in product liability actions. (Former

§ 1714.45, subd. (a), Stats. 1987, ch. 1498, § 3, pp. 5778-5779.) The statute defines a product liability action as "any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty." (*Id.*, subd. (b), Stats. 1987, ch. 1498, § 3, p. 5779.)4 Therefore, the immunity conferred by the Immunity Statute does

not cover liability for manufacturing defects in tobacco products or to a tobacco *(Fn. Continued from previous page)*

The Court of Appeal also consolidated plaintiffs appeal for purposes of oral argument with that of Albert J. Pavolini, who had likewise claimed in his lawsuit that he suffered personal injury caused by smoking cigarettes. When Pavolini died, the Court of Appeal substituted his successor in interest, Richard Donaldson, as plaintiff in that case. Because Donaldson did not seek review here, we do not further discuss that consolidated matter.

Former section 1714.45 provided: "(a) In a product liability action, a manufacturer or seller shall not be liable if: ¶ (1) The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and ¶ (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, *tobacco*, and butter, as identified in comment in Section 402A of the Restatement (Second) of Torts. ¶ (b) For purposes of this section, the term 'product liability action' means any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty. ¶ (c) This section is intended to be declarative of and does not alter or amend existing California law, including Cronin v. J.B.E. Olson Corp., (1972) 8 Cal. 3d 121, and shall apply to all product liability actions pending on, or commenced after, January 1, 1988." (Italics added.)

company's breach of an express warranty, but otherwise it appears in general to cover all liability for injury or death caused by tobacco products.

Additional limitations on the scope of the immunity may be deduced from the history and purpose of the Immunity Statute, which we examined in detail in *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal. 4th *985 (Richards)*, a unanimous decision. The statute's express premise, we said, was "that suppliers of certain products which are 'inherently unsafe,' but which the public wishes to have available despite awareness of their dangers, should not be responsible in tort for resulting harm to those who voluntarily consumed the products despite such knowledge." *(Id.* at p. 1002.) We described the Immunity Statute as based on the principle that "if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user." *(Id.* at p. 999, italics omitted.) Thus, as applied to tobacco products, the Immunity Statute was intended to protect tobacco companies from liability for their conduct as manufacturers and sellers of products containing tobacco that is pure and unadulterated, when the claim seeks damages for personal injuries or death resulting from

dangers or risks that are commonly known to be inherent in tobacco products.

We now apply this understanding of the purpose and scope of the Immunity Statute to the allegations of plaintiffs first amended complaint, which seeks damages from defendant tobacco companies for plaintiffs lung cancer, which was diagnosed in October 1996. At that time, plaintiff had smoked cigarettes regularly since *1950*. His complaint alleged causes of action for negligence, product liability, and various theories of fraud, based, in part at least, on defendants' conduct in manufacturing and distributing cigarettes during the statutory immunity period.

Plaintiff argues that the Immunity Statute bars only product liability claims and not claims based on fraud. According to plaintiff a fraud claim is one that challenges the propriety of defendants' conduct, while a product liability claim is one that assails the safety of defendants' products.

The Court of Appeal rejected plaintiff's proposed distinction between fraud and product liability claims as "of no consequence in interpreting [the Immunity Statute], because the Legislature supplied its own expansive definition of... 'product liability' actions." As defined by the Legislature in the Immunity Statute, a product liability action is "any action for injury or death caused by a product, except that the term does not include an action based on a manufacturing defect or breach of an express warranty." (Former § 1714.45, subd. (b).) Relying on that language, the Court of Appeal stated: 'The Legislature's plain language compels the conclusion that whether based on allegations or theories of fraud, negligence, or manufacture of an inherently unsafe product, an action in which a plaintiff seeks damages for personal injury or death caused by a tobacco product clearly is a 'product liability' action within the meaning of the statute." Thus, the Court of Appeal held, the Immunity Statute bars each

of plaintiff's various claims that defendant tobacco companies defrauded the public about the safety of their products and the risks of tobacco use.

We agree with the Court of Appeal that under the Immunity Statute's broad definition of product liability lawsuits, it makes no difference whether a claim seeking damages for personal injury or death" caused by a tobacco product is labeled as one for negligence, manufacture of an inherently unsafe product, or fraud. But we disagree with the Court of Appeal that the Immunity Statute precludes plaintiff's recovery under all of his fraud allegations.

As we explained in Richards, which we discuss at length in the companion case of Myers, supra, ó Cal 4th___the Immunity Statute drew "its express inspiration from product liability principles addressed by section 402A of the Restatement Second of Torts (Restatement), and particularly comment I thereto (comment I)." (Richards, supra, 14 Cal.4th at p. 999, citing former § 1714A5, subd. (aX2).) We observed: "Section 402A of to Restatement proposes generally that when a manufacturer or distributor sells a product 'in a defective condition unreasonably dangerous to to user or consumer' [citation], and to product reaches that person, as expected and intended, without substantial change in its condition, to seller is 'subject to liability' for physical harm 'thereby caused to to ultimate user or consumer.' "(Richards, supra, at p. 999, italics deleted.)

We went on to say in Richards: "However, comment i asserts an important qualification of the general ~e.... Comment I makes clear that, under the Restatement formulation, '[t]he rule [of liability] applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer.' (Restatement, p. 352, italics added.) As comment ithen explains, '[m]any products cannot possibly be made entirely safe for all consumption,' but if a product is pure and unadulterated, its inherent or unavoidable danger; commonly known to

the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user.

"Thus, comment I observes, '[o]rdinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture,' but this is not what the Restatement means by 'unreasonably dangerous.' 'Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics.... Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful

.... Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks....' (Restatement, pp. 352-353, italics added.)" (Richards, supra, 14 Cal.4th at p. 999, some italics added in first par.) Richards added: "The clear premise of comment i is that no 'liability' arises under the circumstances therein described because there is no sound basis for liability. In other words, comment i posits, a manufacturer or seller breaches no legal duty to voluntary consumers by merely supplying, in an unadulterated form, a common commodity which cannot be made safer, but which the public desires to buy and ingest despite general understanding of its inherent dangers."

(Richards, supra, 14 Cal.4th at p. 1000.)

Thus, as we explained in Richards, the Immunity Statute applied with respect to 'pure and unadulterated" tobacco products (that is, products whose contents consumers "desired to buy and ingest'), notwithstanding that the

"inherent or unavoidable danger[s]" of those products were '~commonly known to the community." (Richards, supra, 14 Cal.4th at pp.999-1000, italics added.)

Accordingly, the statutory immunity does not shield a

tobacco company from product liability for injuries or deaths to consumers of its products caused by something not inherent in the product itselfóthat is, if some adulteration of the product made it unreasonably dangerous.

In this cm, the trial court relying on the Immunity Statute sustained defendants' demurrer top~~s first amended complaint, which included four theories of recovery based on alleged fraud by tobacco companies. For the limited purpose of reviewing that ruling with respect to those four theories of recovery, we treat the first amended complaint's allegations as true. (Kasky v. Nike (2002)27 Cal.4th 939,946.)

The trial court was wrong that the Immunity Statute required it to sustain defendant tobacco companies' demurrer to two causes of action alleged in plaintiff's first amended complaint In one of these, plaintiff alleges that defendants 'manipulat[ed] the addictive properties of cigarettes ~... additives," and in the other he asserts that defendants "control[led] nicotine delivery to the smoker, through adding ammonia." The essence of these allegations is that defendant tobacco companies adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Because, as we have explained, the statutory immunity does not shield a tobacco company from liability for injuries or deaths caused by something not inherent in the product itself, the Immunity Statute does not bar these claims.

But the trial court was correct to sustain defendant tobacco companies' demurrer to two other fraud claims alleged in plaintiff's first amended complaint, to the extent those claims were based on conduct by tobacco companies during the immunity period. (The concurring and dissenting opinion, however, would allow plaintiff to pursue these two claims.)

The complaint alleges that defendants "control[led] the nicotine content of their cigarettes... by developing high-nicotine tobacco and blended tobacco." Because nicotine is naturally present m tobacco, the risks associated with nicotine are inherent in tobacco products. Therefore, an allegation that defendants increased the nicotine content of their cigarettes through blended or high-nicotine tobacco does not avoid the bar of the Immunity Statute because it does not allege that defendants exposed plaintiff to a risk other than those inherent in tobacco products.

The state Court of Appeal reached a similar conclusion in American Tobacco Co. v. Superior Court (1989)208 Cal.App.3d 480 (American Tobacco), a decision authored by Presiding Justice J. Anthony Kline. Although it observed that the Immunity Statute's protection would not extend to risks caused by "unknown dangerous elements" in a tobacco product (id. at p. 490, fn. 5), the Court of Appeal rejected the plaintiffs' contentions in that cm that the word "tobacco," as used in the Immunity Statute, applied only to unprocessed tobacco leaves rather than to cigarettes: "The Legislature could not have intended to limit the statute topure tobacco any more than it intended 'alcohol' [another product listed in the Immunity Statute] to apply only top~ alcohol and not to beer, wine and other liquors, which are the forms in which alcohol commonly is consumed." (Ibid.)

Plaintiff's first amended complaint further alleges that defendants 'lied about the addictive nature of smoking," in "a campaign designed to deceive the public, plaintiff the government, and others as to the health hazards of smoking." According to the complaint, this deception began before 1969, when the federal government first banned certain cigarette advertising, and it continued after 1969, when defendants "disseminate[d] deceptive, erroneous, misleading and false statements" about the 'health hazards" and "addictive nature" of smoking cigarettes. These allegations do not suggest that the cigarettes plaintiff smoked exposed him to dangers other

than those inherent in cigarette smoking. Thus, to the extent they pertain to conduct by tobacco companies during the immunity period, these allegations fall squarely within the reach of the Immunity Statute, which, during its effective dates from January 1, 1988, until December 31,1997, shielded tobacco companies against product liability "for injury or death" caused by pure and unadulterated tobacco products. As this court explained in Richards, the Legislature enacted the Immunity Statute to protect manufacturers and sellers of certain inherently dangerous products, including cigarettes, from liability for injuries caused by those products precisely because the Legislature itself had concluded "the public desires to buy and ingest [those products] despite general understanding of [their] inherent dangers." (Richards, supra, 14 Cal. 4th at p. 1000.)

According to the concurring and dissenting opinion, the Immunity Statute does not bar plaintiff's fraud claim based on allegations that defendant tobacco companies deceived the public about the addictive nature of nicotine because smokers generally were not aware of the specific health risks of cigarette smoking. But in American Tobacco, supra, 208 Cal.App.3d 480, decided the year after the Surgeon General issued his report concluding that nicotine is addictive, the Court of Appeal soundly rejected essentially the same argument. It explained: "[T]here is no requirement under [the Immunity Statute] that consumers fully appreciate all the risks involved in the use or consumption of [a particular] product[].... [I]t is sufficient if the ordinary consumer knows the product is 'unsafe.'" (Id. at p. 490, fn. 5.)

III

From January 1, 1988, and lasting through December 31, 1997, California's Legislature, by its enactment of the Immunity Statute, protected tobacco companies from product liability lawsuits by smokers. Here, plaintiff was a cigarette smoker for 46 years (from 1950 through 1996). He

argues that the immunity does not apply to defendants' conduct during the 37 years he smoked before January 1, 1988, the effective date of the Immunity Statute. We agree.

As we hold in the companion case of Myers, supra, ___ Cal.4th ___,the Immunity Statute governs conduct of tobacco companies during the immunity period, which began on January 1, 1988, and ended on December31, 1997. But when, on January 1, 1998, the California Legislature's repeal of that immunity took effect, the Legislature restored the common law principles that had, until enactment of the Immunity Statute, governed tort liability against tobacco companies. Thus, the Immunity Statute provides no protection to tobacco companies for conduct that occurred before the statute's 10-year period of immunity.

Regarding defendants' conduct during the statutory immunity period, we conclude that the Immunity Statute bars plaintiffs claims, however labeled, where they allege no more than personal injury caused by dangers or risks inherent in the consumption of tobacco products such as cigarettes. But the Immunity Statute does not bar plaintiffs claims that the defendants adulterated the cigarettes plaintiff smoked with additives that exposed him to dangers not inherent in cigarette smoking. Nor does the Immunity Statute shield tobacco companies from liability for conduct outside the immunity period.

DISPOSITION

We reverse the judgment of the Court of Appeal and remand to that court for reconsideration of plaintiffs appeal in light of our conclusions here and in the companion case *of Myers.*

KENNARD, I

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

CHIN, J.

BROWN, J.

## CONCURRING OPINION BY BROWN, J.

I agree with the majority that plaintiffs (see maj. opn., *ante,* at p. 3, fn. 3) causes of action alleging defendants manipulated the addictive properties of cigarettes by adding ammonia should survive demurrer. I write separately to express my concern that the majority has extended the immunity of Civil Code section 1714.45 (section 1714.45) only to products that are "pure and unadulterated" (maj. opn., *ante,* at pp. 5, 8-1 1), imposing a standard that is vague and misleading as well as potentially inconsistent with legislative intent.'

Any product processed with one or more additives and thus no longer in its raw or natural state is arguably not "pure and unadulterated"; but that was not how we used the term in *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th *985 (Richards).* In *Richards,* the court did not formulate a standard for determining the scope of section 1714.45 immunity but addressed the more fundamental question of the basis for statutory immunity. We explained that "if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability

1 Although this case arises under former section 1714.45, which

included tobacco as one of the "common consumer product[s]" exempted from product liability actions under the conditions described (Stats. 1987, ch. 1498, § 3, p. 5778), the majority's standard will apply equally to the current version of section 1714.45, which continues to extend immunity to numerous other products. (See § 1714.45, subd. (a)(2).) This breadth of application makes formulation of the proper standard particularly critical.

for resulting harm to a voluntary user." (*Richards*, at p. 999, italics omitted.) As the analysis in *Richards* makes clear, this reference to "pure and unadulterated" must be read with reference to comment *i* of section 402A of the Restatement Second of Torts (Restatement), from which section 1714.45 "draws its express inspiration... ." (*Richards*, atp. 999; see § 1714.45, subd. (a)(2).)

Comment *i* qualifies the general rule of liability for unreasonably dangerous products: "Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous." (Rest., § 402A, corn. *i*, pp. 252-253.)

From this explanation, we can reasonably infer that the

Legislature did not extend section 1714.45 immunity to products that are contaminated, perhaps through improper storage or transport, or contain some ingredient making them unfit for ordinary consumption. Such contamination, however, is not the same as processing a "pure and unadulterated" product as by incorporating additives to make it more palatable or appealing to the consumer.

In today's high technology economy, such adulteration is common practice-even in common consumer products one might reasonably assume are "pure and unadulterated" (see, e.g., 7 C.F.R. § 205.605 [listing several dozen nonsynthetic and synthetic substances that "may be used as ingredients in or on processed products labeled as 'organic' "]) but it does not result in products that would fall outside the immunity of section 1714.45. For example, most wines do not contain "pure and unadulterated" grapes but have sulfites added to discourage bacterial growth as the wine ferments. Sulfur-based preservatives prevent discoloration in the drying of "pure and unadulterated" fruits such as apricots. Nitrites and nitrates preserve flavor and delay the development of toxins when used to cure "pure and unadulterated" meats for bacon and ham. By the same reasoning, consumers generally do not buy unprocessed tobacco but cigarettes, which may contain nontobacco additives that make them more attractive to the consumer. That processing does not *necessarily* make the tobacco adulterated, i.e., contaminated, even if the product is no longer "pure and unadulterated." Thus, to the extent such cigarettes meet consumer expectations, they would not be unreasonably dangerous as contemplated by comment *i* and should come within the statutory immunity.

This conclusion is fully consonant with our reasoning in *Richards*, irrespective of the passing reference to a product that is "pure and unadulterated." As the court went on to explain, "Like comment *i*, section 1714.45 negates 'liab[ility]' to voluntary users for the mere manufacture or

sale of 'common consumer product[s] intended for personal consumption,'.., which are 'inherently unsafe' and are understood to be so by 'ordinary knowledge common to the community,' but which are nonetheless consumed with such ordinary knowledge. Like the Restatement, the statute thus precludes 'liab[ility]' for the furnishing of such products on grounds that *under the circumstances described in the statute,* their 'inherent' dangers do not make them 'defective' when used as intended by voluntary consumers who are aware of the risks.... In other words, under the conditions described by section 1714.45, a tobacco supplier simply commits no tort against knowing and voluntary smokers by making cigarettes available for their use." (*Richards, supra,* 14 Cal.4th at p. 1000, italics added, original italics omitted.)

Thus, in *Richards,* we hewed to the statutory language, as informed by comment *i,* in defining liability under former section 1714.45. In my view, we should do the same in articulating the scope of the immunity and not engraft a "pure and unadulterated" standard. This is not to say that some additives may not give rise to unique dangers that take a product outside the statutory definition; but we should not adopt a standard that will potentially sweep too many cases within its ambit. I therefore agree with the majority that plaintiffs action may proceed on the theory that the addition of ammonia or other additives to cigarettes posed some *independent risk* not within the "ordinary knowledge common to the community" about the dangers of tobacco. (Former § 1714.45, subd. (a)(2).) Plaintiff, of course, will have to prove that case.

BROWN, J.

CONCURRING AND DISSENTING OPINION BY WERDEGAR, J.

I agree with the majority that the immunity conferred by Civil Code former section 1714.45 (Stats. 1987, ch. 1498, § 3, p. 5778) (the Immunity Statute) bars plaintiffs claims

"where they allege no more than personal injury caused by dangers or risks inherent in the consumption of tobacco products such as cigarettes" (maj. opn., *ante,* at p. 11), insofar as that holding is limited, as the statute requires, to dangers or risks commonly known to the community and to conduct within the immunity period.' I further agree that such immunity "does not extend to allegations that tobacco companies, in the manufacture of cigarettes, used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking." (Maj. opn., *ante,* at p. 3.)

I disagree with the majority that the Immunity Statute does not permit recovery based on plaintiffs allegations that "defendants 'control[led] the nicotine content of their cigarettes.., by developing high-nicotine tobacco and blended

1 The Immunity Statute applied to certain conduct occurring from January 1, 1988, to December 31, 1997 (the immunity period), so that no product liability cause of action may be based on that conduct, regardless of when the users of covered products may have sustained or discovered injuries caused thereby. An amended version of Civil Code section 1714.45, enacted in 1997 (Stats. 1997, ch. 570, § 1), eliminated any immunity for tobacco manufacturers. (See *Myers v. Philli~ Morris Companies, Inc.* (Aug. 5, 2002, S0952 13) __ Cal.4th *ó, ó* [pp. 2-3].)

tobacco' "(maj. opn., *ante,* at p. 9) and" 'lied about the addictive nature of smoking' "(*id.* at p. 10, quoting the operative first amended complaint). The majority rests here on the assertion that "[t]hese allegations do not suggest that the cigarettes plaintiff smoked exposed him to dangers other than those inherent in cigarette smoking" (*id.* at p. 10; see also *id.* at p. 9), but that is beside the point. The allegations *do* suggest that the cigarettes plaintiff smoked exposed him to dangers beyond those commonly known to be associated with cigarette smoking. They therefore fall outside the Immunity Statute which, as the majority acknowledges, does not extend to such allegations. (Maj. opn., *ante,* at p. 3.)2

The Immunity Statute provided in pertinent part that, "(a) In a product liability action, a manufacturer or seller shall not be liable if: ¶ (1) The product is inherently unsafe and

the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and ¶ (2) The product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in comment ito Section 402A of the Restatement (Second) of Torts." (Civ. Code, former § 1714.45, Stats. 1987, ch, 1498, § 3, pp. 5778-5779.)

As the majority acknowledges, in *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985 *(Richards)* we described the Immunity Statute as "based on the

2 I agree with the majority that on demurrer "an allegation that defendants increased the nicotine content of their cigarettes through blended or high-nicotine tobacco does not avoid the bar of the Immunity Statute [as part of a theory] that defendants exposed plaintiff to a risk *other than* those inherent in tobacco products." (Maj. opn., *ante,* at p. 9.) As I explain more fully below, however, such an allegation *may* avoid the bar of the Immunity Statute as part of a theory that defendants exposed plaintiff to a product not "known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community." (Civ. Code, former § 1714.45, subd. (a)(1), Stats. 1987, ch. 1498, § 3, p. 5778.)

principle that 'if a product is pure and unadulterated, its inherent or unavoidable danger, commonly known to the community which consumes it anyway, does not expose the seller to liability for resulting harm to a voluntary user.'" (Maj. opn., *ante,* at p. 5, quoting *Richards, supra,* 14 Cal.4th at p. 999.) Here, the crux of plaintiffs allegations respecting consumer knowledge at relevant times is that defendants' products posed dangers other than those commonly known to be inherent in cigarette smoking. Thus, plaintiff alleges in detail that defendants carried out a campaign designed to deceive the public, plaintiff, the government, and others as to the health hazards of smoking, including the addictive nature of smoking, to conceal the results of their own research, and to misrepresent their actual role in manipulating the addictive properties of cigarettes via nicotine and other additives.

Plaintiff alleges that defendants conspired to deceive the government and the consuming public (including plaintiff himself) by a variety of means. For example, according to plaintiff defendants established, funded and publicized tobacco industry "research" bodies, which they touted as unbiased and trustworthy, and thereafter falsely represented to plaintiff and others that emerging questions about smoking and health would be truthfully answered by these bodies.[3] Defendants also conspired to coordinate their responses to any statements by the Surgeon General or to other governmental action. In furtherance of that conspiracy, plaintiff alleges, defendants "concealed their actual knowledge concerning their own negative health and addiction research results and their manipulation and control of the nicotine content of their products to create and

3 Plaintiff alleges activities by the Tobacco Institute, the Tobacco Industry Research Committee, the Tobacco Research Council, Tobacco Research U.S.A., Inc., and the Council for Tobacco Research.

perpetuate smokers' addiction to cigarettes..... Before 1969 (when certain cigarette advertising was banned), defendants placed "deceptive, erroneous, misleading, and false advertisements" in all media "designed to conceal to true health hazards and addictive nature of cigarettes and to lure new, especially youthful, users to replace to older ones who died." After 1969, defendants "continued to disseminate deceptive, erroneous, misleading, ad false statements concerning to state of to medical research concerning cigarettes ad to diseases toy, as well as to health hazards and addictive nature of cigarettes ... At relevant times, plaintiff also alleges, defendants abused legal processes "to misdirect what purported to be objective scientific research to create favorable, and to suppress unfavorable, findings regarding to halt consequences of smoking."

Throughout to immunity period, according to plaintiff

defendants thus aimed "to intentionally frustrate to flow of information fr6m to medical and scientific community to the general public on to halt risks and addictive nature of cigarettes." Defendants allegedly "controlled, and continue now to control nicotine content of their cigarettes... and engineer their cigarettes to control nicotine delivery to the smoker.... They ten concealed their knowledge of to addictive nature of nicotine and of their manipulation of nicotine levels and delivery. Defendants have denied, and continue to deny publicly that nicotine is addictive, or that toy attempt to or do achieve levels of nicotine in their products to create or sustain addiction." Defendants' well-funded and deceptive public relations campaign, including "literally hundreds of misrepresentations to plaintiff and others over to course of to last 40 years," plaintiff alleges, 'resulted in plaintiff being unaware" of "the extent to which smoking presented a serious hazard to his health, [or] that to nicotine therein would addict him to smoking ... . " Indeed, as has been noted, "The tobacco industry has repeatedly told to public that nicotine is not addictive. Most specifically and most dramatically, at a congressional hearing on April 14, 1994, seven tobacco company CEOs each in turn stated that nicotine is not addictive." (Glantz et al., The Cigarette Papers

(1996) p. 100.)4

In short, plaintiff alleges, "[t]he addictive effect of nicotine has long been known and concealed by the defendants." Despite their secret knowledge, defendants "intentionally conspired to mislead, deceive and confuse the government, and the public, including plaintiff concerning the harmful and debilitating effects smoking has on the health of individuals, that nicotine in cigarettes is a powerfully addictive substance, and that defendants intentionally manipulate levels of nicotine delivery in cigarettes to ensure that smokers remain addicted." "One of the goals of the conspiracy," plaintiff alleges, "was to create a false controversy regarding the health hazards of tobacco use and the addictive properties of nicotine in

order to protect the market for cigarette sales and the profits of the tobacco industry" defendants. Consequently, plaintiff alleges, despite the availability of some governmental information respecting smoking and addiction, "[a]t times material, the ordinary consumer, including the plaintiff, did not in the exercise of ordinary diligence know of the likelihood of, the severity of, or the risks from" cigarettes.

4 See generally Vladeck, *Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg* (2001) 31 Seton Hall L. Rev. 631, *635*, wherein the author notes that in a recent book former federal Food and Drug Administration Commissioner David Kessler cites evidence obtained in litigation "to make his case that the tobacco industry deceived Congress, regulators, and the American people about the addictive nature of its products and its ability to manipulate the nicotine dose delivered by cigarettes to maintain addiction." (See also Kessler, A Question of Intent: A Great American Battle With a Deadly Industry (2001).)

Plaintiff thus plainly alleges *more* than '~personal injury caused by dangers or risks inherent in to consumption of tobacco products such as cigarettes" (maj. opt, *ante,* at p.11); ho alleges tat defendants secretly manipulated to nicotine content of cigarettes to enhance their addictive properties, tus subverting to "ordinary knowledge common to to community," and materially misled to ordinary consumer about cigarettes' addictiveness. (Cf. Civ. Code, former § 1714.45, subd. (a)(1), Stats. 1987, ch, 1498, § 3, p. *5778.)*

It is a "fundamental premise" of to Immunity Statute tat ft negates liability only to "knowing and voluntary consumers" of covered products and ten only when to conditions described in to statute including to condition that "the product is known to be unsafe by to ordinary consumer"-obtain. *(Richards, supra,* 14 Cal.4t at p. 1000.) The majority not only acknowledges to point (maj. opn., *ante,* at p. *5),* but relies on ft to conclude tat plaintiff's allegati ns concerning additives fall outside to Immunity Statute (see *id.* at p. 8). But there is no principled way to distinguish for these purposes between plaintiffs allegations tat defendants secretly used additives and his

allegations that defendants secretly manipulated and lied about to addictiveness of their product. Both activities allegedly "exposed smokers to dangers beyond those commonly known to be associated wit cigarette smoking" (maj. opn., *ante,* at p. 3); therefore, both fail outside to Immunity Statute.

The majority apparently takes to view that to Legislature in to Immunity Statute declared to dangers of cigarettes to be commonly known as a matter of law. (See, e.g., maj. opt, *ante,* at pp. 4-5.) In suppo4, to majority asserts tat in *Richards, supra,* 14 Cal.4t at page 1000, we "explained" tat to Legislature itself had concluded tat tobacco products automatically qualify for immunity because tore existed" *'general understanding of [their] inherent dangers."*

(Maj. opn., *ante, at p.* 10, italics added.) But that is not what the Immunity Statute says, nor is it the import of what we said in *Richards.*

On its face, the Immunity Statute mentions tobacco (along with sugar, castor oil, alcohol, and butter) only *conditionally,* as a consumer product that *might* qualify for immunity if certain other, separately specified, requirements are met. Thus, tobacco appears in a list of examples of "common consumer product[s] intended for personal consumption" (Civ. Code, former § 1714.45, subd. (a)(2), Stats. 1987, ch. 1498, § 3, p. *5778)* that qualify for immunity if, but only if they meet the requirements set out in subdivision (a)(1), a separate part of the statute. Subdivision (a)(1) requires that any common consumer product proposed for immunity be "inherently unsafe *and...* known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community." (Italics added.)

When noting in *Richards* that tobacco was specifically included in the Immunity Statute's list of inherently unsafe "common consumer product[s]," we also carefully noted, in fealty to the statute's plain language, that the statute

precludes liability only "under the circumstances described in the statute" (*Richards, supra,* 14 Cal.4th at p. 1000) including, of course, the circumstance that "the product is known to be unsafe by the ordinary consumer" (Civ. Code, former § 1714.45, subd. (a)(1), Stats. 1987, ch. 1498, § 3, p. 5778).

Even if, as the majority asserts, and contrary to the statute's plain language, the Legislature in enacting the Immunity Statute intended to deem, as a matter of law, that the consuming public had a" 'general understanding' "of tobacco's inherent dangers (maj. opn., *ante,* at p. 10), any such intent logically could have encompassed at the most only those dangers of tobacco that had been publicly reported by the time the Immunity Statute was enacted in 1987. But in the period leading up to and at the outset of the immunity period, the predominant public document informing consumers about to addictiveness of tobacco was to Surgeon General's 1964 Report on Smoking and Health (Surgeon Gen. Advisory Coin. Rep., Smoking and Health (1964) (1964 Report)). Significantly, tat report concluded that tobacco use "should be characterized as an habituation *rather than an addiction."* (*Id.*, ch. 4, p. 34, italics added.) The 1964 Report actually *minimized* to health hazards of nicotine in cigarettes, arguing tat "the chronic toxicity of nicotine in quantities absorbed from smoking and other methods of tobacco use is very low and probably does not represent an important health hazard." (*Id.*, ch. 4, p. 32.)

Not until 1988, one year *after* to Immunity Statute was enacted, did to Surgeon General state unequivocally tat cigarettes and other forma of tobacco are addicting and tat nicotine is to drug in tobacco that causes addiction. (See Centers for Disease Control and Prevention, Dept Health & Human Services, The Health Consequences of Smoking: Nicotine Addiction (1988); see also www.cdc.gov/tobacco/sgrpago.htm [as of Aug. 5,2002].) Moreover, that to delivery to Congress in 1988 of a medical report on tobacco's addictiveness conferred on other to

California Legislature or California consumers a general understanding of tobacco's addictive properties does not necessarily follow. In any event since neither to public nor to Legislature could possibly have known about dangers of tobacco use that wore discovered or disclosed only *after* to Immunity Statute was enacted, to Legislature cannot have intended to bar suits based on such dangers.

Contrary to the majority's implication, to *addictive* property of a substance is qualitatively different from a mere "health risk~' attendant upon its ingestion.

(See maj. opn., *ante,* at pp. 10-11, citing *American Tobacco Co. v. Superior Court* (1989) 208 Cal.App.3d 480.) As discussed, plaintiff alleges tat, as a consequence of defendants' misleading conduct, ho and other ordinary consumers did *not* during the immunity period appreciate the relevant risks, specifically the risk of addiction, involved in to use or consumption of tobacco. Moreover, once a individual is addicted to a substance, that individual arguably cannot reasonably be deemed a voluntary consumer. Consequently, *American Tobacco, a* Court of Appeal decision issued only at the outset of to immunity period ad five years before to bombshell disclosures about tobacco companies' behavior on which plaintiff's allegations largely are based (see Glantz et at, The Cigarette Papers, *supra,* p. xvii), is of no persuasive value.

The majority improperly denies plaintiff a opportunity to attempt to demonstrate the truth of his allegations respecting the consuming public's knowledge at relevant times. (Maj. opn., *ante,* at pp. 9-10.) Plaintiff's allegations may or may not ultimately be provable, of course, but on review of a grant of demurrer their provability is not relevant since we assume them to be true. *(Kaslcy v. fiSke, Inc.* (2002)27 Cal.4th 939,946; see also *General Dynamics Corp.* i'. *Superior Court* (1994)7 Cal Ath 1164, 1177; maj. opn., *ante,* at p. 8.) Since the Immunity Statute cannot apply if plaintiff's allegations are true, the majority is

mistaken in concluding as a matter of law that the Immunity Statute does not permit recovery based on these allegations. From that conclusion I respectfully dissent.

WERDEGAR, J.

I CONCUR

MORENO, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion Naegele v. R.J. Reynolds Tobacco Co.

Unpublished Opinion

Original Appeal

Original Proceeding

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# EXHIBIT C

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PATRICIA HENLEY, Plaintiff and Respondent, A086991

V.

PHILIP MORRIS INC., Defendant and Appellant.

(San Francisco County Super. Ct. No. 995172)

** Pursuant to California Rules of Court, rules 976110 and 976.1, this s≥pinion is certified for publication with the exception of parts II, III, IV, V, VI, and VII*

Plaintiff brought this action for personal injuries allegedly sustained as a result of defendant's tortious misconduct in the manufacture and marketing of cigarettes. The jury returned a special verdict awarding plaintiff $1.5 million in compensately damages and *$50* million in punitive damages. The trial court denied defendant's motions for new trial and judgment notwithstanding the verdict, except that it ordered a new trial on punitive damages unless plaintiff consented to reduce the punitive award to *$25* million. Plaintiff consented to the reduction, and defendant filed a timely appeal.

Defendant raises a host of objections, many not preserved for appeal. Its primary contentions are that (1) all of plaintiff's claims are barred by the immunity conferred on tobacco manufacturers from 1988 to 1998 by former Civil Code section *1714.45* (section 1714.45); FN1 (2) the jury was

misinstructed on the limitations imposed on plaintiff's claims by the Public Health Cigarette Smoking Act of 1969, title 15 United States Code section 1331 et seq. (the 1969 Act); (3) each of plaintiff's claims is deficient in various particulars; and (4) the punitive damage award cannot be sustained. We find no prejudicial error, and affirm the judgment.

## INTRODUCTION AND BACKGROUND

We begin with a fundamental principle persistently overlooked by defendant: "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 394.) Thus in ascertaining the underlying facts for purposes of appellate analysis, the reviewing court "must consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment." (*Id.* § 359, p. 408, italics in original.)

Viewed most favorably to the judgment, the evidence shows that plaintiff, who was born in 1946, began smoking cigarettes in 1961 or 1962, at the age of 15, when she "lit up" with some school friends outside a dance. At that time she felt smoking was "cool" and "grown up," provided the pleasure of the forbidden, made her look older, and served as a "rite of passage." Then and for some years thereafter, nobody told her that cigarettes could cause her serious disease. There were no warnings on cigarette packages or in advertisements. Plaintiff was not taught in school about the dangers of tobacco. As a result she believed that cigarettes, which contained "tobacco, pure and simple," were "not a harmful product." Nor did she know that cigarettes or nicotine could be addicting. Nothing in the advertising she saw suggested that if she started smoking

she might be unable to stop.

The jury could also find that starting no later than December *1953*, defendant and other cigarette manufacturers agreed to act together to counter mounting scientific evidence about the health risks of cigarette smoking. By the time plaintiff began smoking, defendant knew that tobacco contained numerous carcinogenic substances as well as flavoring additives that also produced carcinogenic compounds upon combustion. Tobacco manufacturers were also aware of epidemiological studies that showed a strong correlation between smoking and the incidence of lung cancer. Yet they launched a concerted public relations campaign to deny any link between smoking and serious illness. A major part of this strategy was the creation of a "research institute" that would, as the public was told, attempt to find the truth about smoking and health though in fact it was permitted to conduct very little research that might confirm a link, serving mainly, as the jury was entitled to find, to gather ammunition against tobacco's detractors. Other strategies included manipulating the mass media to suppress or make light of adverse news developments, such as new studies or reports.

The jury could also find that defendant engaged in saturation advertising, much of it consciously targeting the teenage audience from which new ("replacement") smokers had to come. Defendant knew that persons who did not begin smoking during their teen years were unlikely to do so. In particular, defendant sold the brand of cigarette plaintiff preferred, Marlboro, using symbols of the independence, autonomy, and mature strength for which teenagers were understood to yearn. The jury could find that these targeted teenage consumers possessed less critical judgment, and were more receptive to marketing manipulation generally, than might be the case with adults. The jury could find that teenagers who went past the experimentation phase became addicted to tobacco, as a result of which they found it extremely difficult to stop

smoking and often suffered impaired judgment with respect to the consequences of continuing to do so.FN2 The jury could find that the strategy of marketing to teenagers and causing them to become addicted to its products was central to the tremendous success and profitability of the Marlboro brand in particular, helping defendant to become one of the largest and most successful corporations in the world.

In 1966, as evidence of health risks mounted, Congress required that cigarette packages bear the relatively mild warning that smoking "may be hazardous." In the 1969 Act, Congress required a somewhat stronger warning and required that it appear in advertising as well as on packages. At the same time, Congress explicitly preempted any state law imposing a "requirement or prohibition with respect to advertising or promotion" of cigarettes language that has since been construed to preempt many but not all common-law tort claims. Although the warnings have since been further strengthened, this partial federal immunity remains in place, and is one of defendant's major defenses here. (See section II, below.)

In 1988 the tobacco industry acquired a safe harbor under California law when, riding the coattails of a legislative compromise, tobacco was listed among "common consumer products" in former section *1714.45*, a statute construed the following year to create an almost complete "immunity" from tort liability. The Legislature repealed that protection effective January 1, 1998, but defendant contends that it nonetheless applies to defeat most or all of plaintiffs claims here. (See section I, below.)

The jury was entitled to find that well before these legislative defenses became applicable, plaintiff had become an addicted smoker with sharply impaired judgment and will where cigarettes were concerned. Plaintiff testified that on the subject of cigarette smoking and health, "my brain wasn't going to register anything that anybody said." When she saw the first package

warnings, she minimized the perceived "degree[] of danger," thinking to herself that it was also "dangerous to walk across the street." She testified that while she heard the United States Surgeon General was saying things about cigarettes, she also knew "that the tobacco companies were saying different" As a result the package warning "didn't faze me one way or the other. I wasn't going to give the cigarettes up at that point"

Plaintiff's first regular brand of cigarettes was Marlboro, and ft remained her favorite brand throughout almost all of her 35-year smoking history. From age fifteen until she was about 43 years old (around 1989), she apparently smoked one-and-a-half to two packs a day of "Marlboro Red," a brand rated to deliver relatively high amounts of tar and nicotine. At that age, however, she switched to Marlboro Lights, a lower-tar brand, on what the jury was entitled to view as the direct advice of a Philip Morris agent Plaintiff testified that around that time she began to hear that "low-tar cigarettes were better. You wouldn't get as much tar and nicotine and, you know, their advertising on the low-tar cigarettes was really out there. ¶ I'm thinking, 'Welt okay. Maybe there's something to this.' So when I was approximately 43,1 decided that, 'Well, I'll check into this and maybe I'll change from the Reds to the Lights.' ¶ So I did indeed call the Marlboro, Philip Morris company and expressed, you know, my concerns as to, 'Is ft really true? Is there less tar in this or less nicotine?' ¶ And I was assured at the time that ff1 was concerned that, yes, I could switch to the Lights...." She did so and, in a few weeks, had more or less doubled her intake, to three-and-a-half packs a day.

By mid-October 1997 plaintiff "was feeling really bad" and "down for the count with what I thought was heavy-duty flu." She was diagnosed in February 1998 with small-cell carcinoma of the lung. The jury was more than entitled to find that this affliction was directly caused by cigarette smoking.

## I. IMMUNITY UNDER FORMER SECTION 1714.45FN3

*A. Nature of Error; Standard of Review.*

Defendant contends that the trial court erred by 'refusing to apply" the immunity panted to tobacco manufacturers prior to 1998 by former section 1714.45. This is not an adequate specification of error. (See 9 Witkin, Cal. Procedure, supra, Appeal, § 340,

p. 382 [court reviews trial court's actions, not reasoning]; *Pittman v. Boiven* (1967) 249 Cal.App.2d 207,215 ["It is the duty of counsel to refer the reviewing court to the portion of the record to which he objects and to show that the appellant was prejudiced thereby.']; *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 ~'ft is not the burden of this court to act as counsel for either party and we will not assume the task of making a search for

*Troen* Page4of44error"]; *segaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218,229 [refusing to consider claims of attorney misconduct unaccompanied by record references].) However, defendant elsewhere notes that the trial court denied a motion for nonsuit based on former section *1714.45.* This is a specific and reviewable ruling. Other matters to which defendant alludes in this regard are not for various reasons, cognizable grounds for reversal.FN4

Defendant was entitled to nonsuit if "as a matter of law, the evidence presented by plaintiff [was] insufficient to permit a jury to find in [her] favor." ( *Nally* i'. *Grace Community Church* (1988)47 Cal.3d 278,291.) Since this is an issue of law, we review it de novo, employing the same standard as the trial court. *(Saunders* i'. *Tqylor* (1996)42 Cal.App.4th *1538,* 1541-1542.) For present purposes it is not seriously disputed that the evidence was sufficient to support findings that plaintiff started smoking cigarettes in the early 1960s and continued to do so until late 1997, as a result of which she contracted lung cancer. Although

defendant makes a half-hearted attempt to cast the point in doubt we infer in support of the judgment that plaintiff did not and could not reasonably discover her cancer before early 1998, when she was diagnosed with that illness and told that it resulted from cigarette smoking. The question thus presented is whether former section 1714.45 precluded the imposition of liability on defendant for plaintiff's injuries as a matter of law. We hold that it did not

*B. Former Section 1714.45.*

Defendant relies on former section 1714.45 as in effect from January 1, 1988, to January 1, 1998. At that time the statute provided that a manufacturer or seller could not be liable in a "product liability action" for injuries caused by a product if the product was "inherently unsafe," was 'Thown to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community," and was "a common consumer product intended for personal consumption, such as... tobacco... ." (Former section 1714.45, subd. (a); Stats. 1987, ch. 1498, § 3, pp. 5778-5779.) "[P]roduct liability action" was defined as "any action for injury or death caused by a product exact... an action based on a manufacturing defect or breach of an express warranty." (*Id.*, subd. (b).)

In 1989 Division Two of this court described former section 1714.45 as a "poorly drafted statute" that failed to convey a single" 'plain meaning' "but "[o]n the contrary," was "on its face amenable to two diametrically opposed interpretations, each of which conflicts in

some significant way with the words the Legislature used." (*American Tobacco Co. v.,Superior Court* (1989) 208 Cal.App.3d 480,485 (*American Tobacco).)* The court nonetheless concluded that the statute created an "immunity" for manufacturers of the enumerated products that was both "automatic" (*Id.* at p. 486) and

"nearly complete" (*Id.* at p. 487). The breadth of this reading may have been cast in some question by *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, which held that in an action for damages resulting from lung disease, an asbestos manufacturer could not reduce its own "comparative responsibility" under Proposition 51 (Civ. Code, § 1431 et seq.) by seeking to attribute a share of responsibility to an absent tobacco company. The court confirmed that former section 1714.45 "immunized" tobacco suppliers. (*Id.* at pp. 1000, 1001, 1003, fn. 8.) At the same time, the court seemed to reserve judgment on the scope and extent of the immunity provided. (*Id.* at pp. 999, 1003, fn. 8.)

The year after *Richards* was decided the Legislature itself undertook to amend former section 1714.45 as it affected tobacco products. From these efforts emerged two statutes. The first added a subdivision (d) to the former statute declaring that it posed no impediment to actions by public entities to recoup the cost of benefits provided to persons injured by tobacco products. (Stats. 1997, ch. 25, § 2, p. 230.) We are more concerned with the second amendment, Senate Bill No. 67, ultimately chaptered as Statutes 1997, Chapter 570 (SB 67). Because it was not an urgency measure, it took effect on January 1,

1998. (See Gov. Code, § 9600, subd. (a).) It made the following changes to former section

1714.45: (1) deleted tobacco from the list of products in subdivision (a); (2) inserted a new subdivision (b), stating that the statute did not "exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions"; (3) modified and renumbered (as subdivision (e)) subdivision (d), which had just been added as noted above; (4) inserted a new subdivision (f) declaring a legislative intention to abolish any "statutory bar" to claims by persons "who have suffered or incurred injuries" and to ensure that "claims which were or are brought" would be "determined

on their merits"; and *(5)* inserted a new subdivision (g) declaring section 1714.45 inapplicable to "tobacco industry research organization[s]." (§ 1714.45.) Accompanying the amendment was a further uncodified declaration of legislative intent. (Stats. 1997, ch. 570, § 2.) SB 67 thus effected a *repeal* of section 1714.45 insofar as it had conferred an immunity on tobacco manufacturers, their successors, and tobacco industry research organizations. The term "repeal" appears in the one-sentence "summary~~ or "digest" in nearly all of the committee and floor reports. (E.g., Sen. Coin. on Judiciary, Rep. on Sen. Bill No. 67 (1997-1998 Reg. Sess.) as amended Feb. 14, 1997 liThis bill would repeal the current immunity conferred upon manufacturers and sellers of tobacco products, as specified in Civil Code Section 1714.45, for products liability."].)

*C. Effect of Statute.*

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1. Express Terms.

The question presented, then, is whether the 1998 repeal of the immunity formerly granted to tobacco manufacturers by former section *1714.45* applies to permit plaintiff's suit Innumerable authorities acknowledge a general" 'presumption' "against giving retroactive effect to statutory changes (e.g., *Buttram* i'. *Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th *520, 536,* fn. 6, quoting *Landgrafv. USI Film Products* (1994)511 U.S. 244,265), but beyond that the jurisprudence of statutory retroactivity is a dense conceptual jungle. We have elected to more or less follow the analytical approach taken

in *Landgraf supra,* 511 U.S. at p. 280. In that approach, the first task is to determine whether the enacting body "has expressly prescribed the statute's proper reach." *(Thid.)* If ft has, there is no occasion to resort to 'judicial default rules." *(Thid.;* see *Western Security Bank v. Superior Court*

(1997) 15 Cal.4th 232, 243 when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us'].) Only if the statute lacks an express directive must the court attempt to determine "whether the new statute would have retroactive effect" for purposes of the judicial presumption. *(Landgraf supra,* 511 U.S. at p. 280) In short, we need not decide whether application of the change to a particular state of facts would be "retroactive" if the statute plainly calls for such application.

We have concluded that the statute here expressly calls for application to the present case. Subdivision (f) of section 1714.45 (subdivision (1)) states, "It is the intention of the Legislature in enacting the amendments to subdivisions (a) and (b) of this section adopted at the 1997-98 Regular Session to declare that *there exists no statutory bar to* tobacco related personal injury, wrongful death, or other tort *claims* against tobacco manufacturers and their successors in interest *by California smokers* or others who *have suffered or incurred injuries,* damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products. It is also the intention of the Legislature to *clarify* that those *claims that were or are brought shall be determined on their merits, without* the imposition of *any* claim *of statutory bar or categorical defense."* (Italics added.)

Three portions of this declaration expressly prescribe a retroactive effect. The first extends the abolition of the prior immunity to persons who *"have* suffered or incurred" damages from tobacco products. A statute" 'speaks from the date ft takes effect.' " *(Hersh v. State Bar* (1972) 7 Cal.3d 241,245, quoting *People v. Righthouse* (1937) 10 Cal.2d 86; see *Right ho use, supra,* at p.88 ["every statute speaks as though the Legislature was in session on the day when the act takes effect and passed ft on that day'].) The statute thus must be understood as a statement by the Legislature, speaking on January 1, 1998, that persons who "ha[d] suffered" damages from tobacco products, as of that date, were not to be impeded in the assertion of claims by the

immunity formerly afforded to tobacco manufacturers. As a matter of common sense, the words chosen could hardly mean anything else, and as a matter of grammar, they do not The quoted phrase uses what is usually referred to as the "present perfect" tense. It refers to an event beginning in the past and either completed in the past or continuing into the present The event here described the suffering of an injury necessarily contemplates antecedent injury-producing *conduct* by the defendant The quoted phrase thus constitutes an explicit extension of the repeal to at least some injuries and conduct preceding its enactment

The statute next declares an intent that "those *claims* that *were* or are *brought* shall be determined on their merits, without the imposition of any claim of statutory bar or categorical defense." This wording, using the simple past tense, is unusual, but that does not deprive ft of effect. The statute speaks as of its effective date, and a reference on January 1, 1998, to claims that "were brought" can only mean *claims brought prior to that date.* We conceive no interpretation of this language, and defendant suggests none, which gives ft any other meaning. It thus reiterates and reinforces the legislative intention to extend the repeal of immunity to at least some past claims not only claims based on past events and conduct, but also claims "brought" before the effective date.

Further textual evidence of retroactive intent appears in the statement that the Legislature intends to *"clarify"* that the described claims will be decided on their merits without regard to the former statutory bar. Here "clarify" is a term of art presumably intended to invoke the rule that "a statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment" (*Western Security Bank v. Superior Court, supra,* 15 Cal.4th 232 at p. 243, italics omitted.) Of course a flat repeal of a prior statute is *not* in fact a mere "clarification"; by definition it changes the law. The Legislature's characterization of such a change as a "clarification" is not binding on us. (*Id.* at p.

244.) Nonetheless ft is textual *evidence* that "may still effectively reflect the Legislature's purpose to achieve a retrospective change." *(Thid.)*

Relying on *CoWeld v. American Tobacco Company* (E.D.Cal. Aug. 6, 1999, Civ-S-98-1695 DFL DAD) an unpublished memorandum of opinion from a federal trial court defendant makes a series of arguments against reading subdivision (9 as

expressly disclosing retroactive intentFN5 Defendant notes that the statute lacks a retroactivity clause as explicit as those found in other statutes. The short answer to this is that California law does not require the most explicit possible clause. The question is whether the Legislature has disclosed by" 'express language or clear and unavoidable implication' "an intent to apply the statute to prior events. ( *Evangelatos v. Superior*

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*Court* (1988)~ Cal.3d 1188, 1208.) We have answered that question in the affirmative. That the Legislature could have made its intentions clearer does not mean ft failed to make them clear enough.

Quoting the unpublished *Co Weld* decision, defendant asserts that subdivision (IF)" 'seems to take a later perspective in time, after January 1,1998, when ft could accurately be said that "there exists no statutory bar.., to tobacco-related tort claims."' "(Ellipsis defendant's.) To the same effect is the suggestion that subdivision (1) might be" 'read from the perspective of future courts, to whom the Legislature is providing interpretive advice."' These statements are devoid of logical force because they are couched in terms of mere apparency or possibility, as if ft were unnecessary to say what the statute actually means. insofar as they assert anything, ft is that the verbs in subdivision (IF) speak from some future time. We discern no basis for this hypothesis, which flatly contradicts the

principle that a statute speaks as of the time of its enactment *(Hersh 's'. State Bar, supra,* 7 Cal.3d at p. 245.) The quoted rumination to the contrary seems to reflect nothing more than an unwillingness to give the Legislature's words their apparent meaning.

We are likewise unpersuaded by the statement that" '[a]n unexplained shift in verb tense is too slender a reed on which to base such a significant departure from normal legislative practice.' "In addition to the reasons already stated, to disregard statutory language as insignificant violates the canon that "whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." *(Agnew v. State Ed. of Equalization* (1999)21 Cal.4th 310, 330.) We are not free to adopt an argument that simply dismisses statutory language as "unexplained" or "too slender."

Somewhat more plausibly, defendant contends that an intent to apply the 1998 legislative changes top~ conduct injuries, or claims, is incompatible with that portion of subdivision (e) of section 1714.45 (subdivision (e)) stating that in any recoupment action brought by a public entity, "the fact that *the injured individual 's claim against the defendant may be barred by a prior version of this section* shall not be a defense." (Italics added.) According to defendant the italicized language is an explicit acknowledgement that as of the effective date of the statute, and thereafter, prior versions of the statute could continue to bar claims. Defendant also suggests that the quoted language would be superfluous if the 1998 amendments effected a complete retroactive repeal of the prior immunity.

Defendant thus obliquely invokes two rules of construction. The first which we have already noted, counsels against a construction that will render parts of a statute

superfluous. (*Agnew v. State Bd of Equalization, supra,* 21 Cal.4th at p. 330.) Defendant seems to imply that if the Legislature intended to retroactively lift the former immunity as ft affected individual claims, ft would not bother to prescribe a rule for cases in which individual claims might be subject to the immunity. Second, defendant may be

understood to suggest that for similar reasons, subdivision (e) actually *conflicts* with subdivision (f) insofar as the latter is construed to make the repeal retroactive; implicit in this suggestion is the further proposition that the conflict should be resolved in favor of subdivision (e).

The indirectness of this argument may stem from the difficulty of asserting ft more cogently without exposing its fatal weakness. In a sentence, the cited language from subdivision (e) does no more than acknowledge the *possibility* that *some* claims "may" be "bred by a prior version of this section." There is no logical conflict between such a statement and an expression of legislative *intent* that claims *not* be barred. Even if the two provisions appeared to be in tension with each other, such tension would not provide a sufficient basis to simply ignore one of them. "It is fundamental that legislation should be construed so as to harmonize its various elements without doing violence to its language or spirit" (*Wells v. Marina City Properties, Inc.* (1981)29 Cal.3d 781, 788; *People v.*

*Garcia* (1999)21 Cal.4th 1,6.) Thus if a statute contains two potentially conflicting terms, a court will attempt to avoid an interpretation that requires ft to disregard one of them "or to rewrite some of their provisions." (*People v. Garcia, supra,* 21 Cal.4th at p. 6.) Such a neutralizing construction, or "reformation," may be undertaken if "compelled by necessity and supported by firm evidence of the drafters' true intent" (*Thid.)* It should be avoided, however, "when the statute is reasonably susceptible to an interpretation that harmonizes all its parts without disregarding or

altering any of them." *(Thid.)*

Here the cited provision of subdivision (e) is readily harmonized with the retroactive repeal of the statutory immunity, at least as applicable to this case. It can be read as a reflection of legislative uncertainty about the future judicial treatment of the repeal. In *Landgraf supra,* 511 U.S. at p. 261, the court rejected an argument that language specifying the prospective effect of some parts of a statute would be superfluous if other parts were not applied. retroactively. The court said that the specification of prospectivity was explained by, among other things, "Congressional doubt concerning judicial retroactivity doctrine." (

• *Ibid.)* Here, the Legislature was not

required to gamble that courts would retroactively apply the repeal of tobacco immunity to any and all individual claims. The Legislature was entitled to anticipate that courts might hold some claims barred, and to act on that possibility by declaring that ft had no effect on

recoupment claims by public entities..

Defendant makes no attempt to harmonize or reconcile subdivisions (e) and (f) but would simply rewrite the latter to remove any reference top~ claims. But defendant makes no attempt to show, and we see no basis to conclude, that such a treatment is "compelled by necessity" or "supported by firm evidence of the drafters' true intent" *(People v. Garcia, supra,* 21 Cal.4th at p. 6.) As we have explained, the supposedly conflicting provisions can be reconciled by positing legislative uncertainty over the extent to which courts would carry out the expressed intent that the statute apply to events and claims predating its effective date. The provisions of subdivision (e) therefore afford no occasion to disregard those expressions of intent

We conclude that the 1998 amendments to section *1714.45* manifest on their face a legislative intent that the repeal of the immunity originally conferred on tobacco companies be effective with respect to claims involving events antecedent to the effective date of the amendments. This is not to say, and we do not decide, whether the repeal extends to *all* claims asserting antecedent events. It is enough for our purposes that the Legislature expressed an intent to extend the repeal to *some* class of antecedent claims. As will appear, if the statute applied to *any* such claims, ft necessarily applies to plaintiffs claims. (See section E, below.)

- 2. Extrinsic Evidence of Legislative Intent

Defendant contends that notwithstanding the text of subdivision (f), the legislative history of the 1998 repeal establishes that ft was not intended to apply retroactively. This argument depends not on the history of the statute as ft ultimately became effective but on the failure, by veto, of another measure introduced in that same session to abolish tobacco manufacturers' immunity under section *1714.45*. The gist of defendant's argument appears to be that the other measure, Senate Bill No. 340 (1997-1998 Reg.

Sess.) (SB 340), explicitly provided for retroactive effect; thus, defendant implies, the failure of that measure is a repudiation of such effect

We find this contention unsound in a number of respects. First although a court seeking to ascertain the proper application of a statute "may properly rely upon extrinsic aids, ft should first look to the words of the statute to determine the Legislature's intent" *(O'Kane*

*v. Irvine* (1996)47 Cal.App.4th 207,211; see *Krazw v. Trinity Management Services, Inc.*

(2000)23 Cal.4th 116, 129 ~ the. language of a statute is clear and unambiguous, judicial construction is not

necessary and a court should not indulge in it']; *IA. Jones Construction Co. v. Superior Court* (1994)27 Cal.App.4th 1568, 1578 [noting dangers inherent in "reading the tea leaves of legislative history"].) Here we see no need to resort to legislative history, or other extrinsic evidence, given the explicit references to past events and claims in subdivision (f).

Second, evidence of unenacted legislation has been repeatedly rejected as a basis for establishing the intent of enacted legislation. (E.g., *People v. Escobar* (1992) 3 Cal.4th 740, 751 r" 'weak reed upon which to lean' "]; *Snyder v. Michael 's Stores, Inc.* (1997) 16 Cal.4th 991, 1003 Ilsamel; *Id.* at p. 1003, fn. 4 [vetoed statute overturning prior decision "provide[d] no guidance"]; *California Labor Federation v. Industrial Welfare Corn.* (1998) 63 Cal.App.4th 982, 994 [disregarding vetoed bill overturning regulatory action]; *Baldwin*

*v. County of Teharna* (1994) 31 Cal.App.4th 166, 181, fn. 10 ["legislative history tea leaves"].)

Third, such light as SB 340 might shed on the legislative intent of SB 67 is unfavorable to defendant's position. SB 340 would have added a new section *1714.55* to the Civil Code dealing exclusively with the application of section *1714.45* to claims asserting specified theories of liability against tobacco manufacturers, their successors, and tobacco industry research organizations. (SB 340 as enrolled Sept. 3, 1997; http://wx ~w.1e info,cacrov/pub/ 97-98/ ill/sen/sb 0301-0350/st 40 bill 19970903 enroll d.htmh) The new statute would have: (1) declared section 1714.45 inapplicable to any action against one of the specified defendants by a person who did not voluntarily consume tobacco; (2) declared section 1714.45 inapplicable to any action against one of

the named defendants sounding in fraud, misrepresentation, or conspiracy; (3) declared the legislative "intent" that section 1714.45 "never applied" to

such actions; and (4) declared that *American Tobacco, supra,* 208 Cal.App.3d 480, "misinterpreted the intent of the Legislature" to a stated extent such that the new statute would not change, but would be declaratory of, existing law. (SB 340, § 1.) The bill also contained a further uncodified expression of legislative intent of little apparent relevance. *(Id.,* § 2.)

The governor's veto message, to which defendant does not allude, states that his refusal to sign the bill rests not on any desire to limit the abolition of the former immunity but on the belief that the bill was redundant of SB 67 and thus threatened to generate needless confusion. The governor wrote that he was refusing to sign the bill because it "creat[ed] exceptions to an immunity which no longer exists." (Governor's Veto Message to Sen. on Sen. Bill No. 340 (Oct. 3, 1997) (1997-1998 Reg. Sess.).) It was in that light that he believed its enactment "would.., serve no purpose," and that it would, if it became law, "create confusion over the meaning of the statute as it is now amended." *(Ibid.)* Thus the Governor's opinion that the proposed statute was redundant of SB 67, far from supporting defendant's argument, suggests that the Governor expected SB 67 to have a similar effect i.e., to apply to all claims Within its scope regardless of when they arose or when the events on which they rested occurred.

Finally, while defendant fails conspicuously to discuss the legislative evolution of SB 67 itself and while the legislative record lacks a "smoking gun" on the subject of

• retroactivity, we find substantial support in it for the premise that subdivision (1) was intended, and indeed its primary purpose was, to extend the abolition of the former immunity to at least some past events and claims. As originally proposed the bill contained no such provision. The first committee analysis on the bill contained the following comments under the heading "Prospective repeal only": "Some concern has been expressed that SB 67

would apply only to causes of action arising on or after January 1, 1998, assuming it is enacted this year. In the absence of specific language in the legislation specifying retroactive application, a measure Will operate prospectively only upon its enactment." (Sen. Coin. on Judiciary, Analysis of Sen. Bill No.67(1997-

1998 Reg. Sess.) as amended Feb. 14, 1997, for hearing date of Apr. 8, 1997.) One week after this acknowledgment of "concern" about a prospective-only application of the amendments as then drawn, the bill was amended by the insertion of what is now subdivision (9. (SB 67, *supra*, as amended Apr. 16, 1997.)

The record also contains evidence that (1) the broad "immunity" found in *American Tobacco* came as a surprise; and (2) the original statute had been enacted under a mistaken understanding induced at least in part by the tobacco industry's own deceptions. In a Senate floor analysis, a supporter of SB 67 is quoted as follows: " 'At the time [of enacting former section 1714.45], it was not anticipated that the California courts would interpret [it] so broadly. Over the last decade, we have also learned much regarding the addictive nature of tobacco and the industry's intentional efforts to mislead the public on the health effects of tobacco. This, coupled With the courts' broad interpretation of the California statute, has precipitated the need to change that statute and remove tobacco's liability protections.' "(Sen. Rules Coin., Floor Analysis, Sen. Bill No. 67(1997-1998 Reg. Sess.) as amended Aug. 11, 1997.)

We conclude that the legislative history does nothing to detract from, and if anything enhances, our conclusion that the express references top~ events and claims in subdivision (1) must be applied to extend abolition of the statutory immunity to at least some events and claims antedating January 1, 1998.

Defendant asserts that application of the 1998 amendments *so* as to deny it the immunity provided by the previous version of the statute will violate the constitutional guarantee of due process of law and the prohibition against ex post facto laws. This, at any rate, is the assertion in defendant's argumentative heading. However, .the ensuing text argues, not that such an application of the amendments is constitutionally prohibited, but that the statute must be *construed* not to permit such an application, under the" 'cardinal principle' that statutes must be construed, whenever possible, to avoid raising constitutional issues."

(Quoting *United States "'. Security Industrial Bank* (1982) *459*

U.s. 70, 78.)

First, defendant suggests that the Legislature cannot retroactively abolish a preexisting defense without violating the due process rights of a party who would otherwise have been entitled to raise that defense. The primary cited authority for this supposed rule is *Morris v. Pac(f Ic Electric Ry Co. (1935)* 2 Cal.2d 764, 768-769. Although the analysis in that case is somewhat oblique, the real holding appears to be that a legislative change in the principles governing the doctrine of "negligence per se" was a substantive change in law which could not be accomplished without a clear indication of legislative intent Defendant quotes, in heavily edited form, the following comment: "[Tihe legislature may not, *under pretense of regulating procedure or rules of evidence,* deprive a party of a substantive right, such as a good cause of action or an absolute or a substantial defense which existed theretofore." (*Id.* at p. 768, italics added.) More critical to our analysis is a statement defendant ignores altogether: *"The legislature did not assume to make the amendment retrospective* and under the circumstances *the court is not warranted in doing so."* (*Id.* at p. 769, italics added.)

Defendant cites *In re Marriage of Garcia* (1998)67 Cal.App.4th 693, 698-699, where we cited *Morris* in holding that a statute silent as to its own application top~ events could not, by the expedient of calling ft "procedural," deprive a party of substantive defenses to which he had long since become entitled by passage of time. We did not purport to hold that retroactive application, if called for by the Legislature, would have been unconstitutional. Similarly, *Zellers v. State of California (1955)* 134 Cal.App.2d 270, was concerned with the effects of an enactment that did not purport by its terms to apply to pre-enactment matters.

Defendant also quotes the statement in *Beck Development Co. v. Southern Pacific*

*Transportation Co.* (1996)44 Cal.App.4th 1160, 1207, that "[i]n general, legislation that makes certain conduct unlawful cannot be applied to conduct that was lawful and completed before its enactment." Application of this proposition is conditioned on (1) categorization of the case in which ft is asserted as falling within the "general" rule, and (2) characterization of the conduct at issue as having been "completed" when the statute took effect. Moreover, this generalization is expressly conceded by the court to rest largely or entirely not on any constitutional prohibition against a contrary result but on the "constructional policy against the retroactive application of legislation." *(Ibid.)* As we have seen, that policy which is a presumption or preference and not, as defendant suggests, a prohibition is overcome here by the express language of the statute. The court's general reference to "constitutional prohibitions" is no more effective than defendant's to establish that this case falls within such a prohibition.

In sum, none of the cases cited by defendant or known to us actually rests on the proposition that the Legislature lacks the *power* to retroactively abolish .a defense ft has previously created. Indeed we see little basis for such an

argument. Even if the defense had become a vested right a dubious proposition such rights"' "may be impaired 'with due process of law' under many circumstances."' "(*In re Marriage o fEouquet* (1976)16 Cal.3d 583, 592.) The dispositive question appears to be"' "whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment"' "(*Thid.*) The Legislature might well conclude that ft was, particularly in light of evidence, alluded to in the legislative record (see above), of concerted efforts by the tobacco industry to deceive smokers, the public, and legislators themselves concerning the dangerous effects of their products.

We also note that any claim of unfairness in the abolition of a statutory defense must take account of Government Code section 9606, which provides, "Any statute may be repealed at any time, except when vested rights would be impaired. *Persons acting under any statute act in contemplation of this power of repeat"* (Italics added.) On its face this provision sharply limits any claim by a defendant that its wrongful conduct is shielded by having been undertaken in reliance on the assurance provided by a statutory defense. Defendant contends in essence that ft was entitled to market dangerous products and misrepresent their dangerousness because ft had been promised that ft could do so without fear of liability. The promise, however, was subordinated to an express legislative reservation of a power of revocation. Upon learning of the true nature of defendant's conduct, the Legislature exercised that power. We see no reason to suppose

that defendant was any more entitled to rely on the statute as protection against inchoate

claims, i.e., claims not yet presented and adjudicated, than a plaintiff would be to rely upon the continued future existence of a statutory cause of action not yet reduced to judgment

We conclude that defendant has demonstrated no sufficient basis on which to hold that

application of the 1998 amendments here would offend the due process clause.

Defendant also makes passing suggestions that application of the 1998 repeal to this case would constitute an ex post facto law in violation of the federal and state constitutions. This argument can have no bearing on an award of *compensatory* damages; the ex post facto clauses" 'apply only to penal statutes.' [Citation.]" *(Greenbaum* i'. *State Bar* (1987) 43 Cal.3d *543, 550.)* Defendant may be understood to suggest that the award of *punitive* damages was "penal" for purposes of the constitutional prohibition, and thus that the 1998 repeal cannot authorize recovery of those damages based on conduct prior to its effective date.

Assuming a punitive damages award might be deemed "penal" for purposes of the prohibition against ex post facto laws, the prohibition only applies if the challenged law "makes that criminal or penal which was not so *at the time the action was pe~~ed... .*" *(Thompson* 't'. *Missouri* (1898) 171 U.S. 380, 383; *United Business Coin.* 'i'. *City of San Diego* (1979)91 Cal.App.3d 156, 172-173, fn. 7.) (Italics added.) The statutory immunity asserted by defendant only existed from January 1, 1988, to January 1, 1998. Accepting for the moment the premise that penalizing conduct *during that period* would offend the ex post facto clause, the same cannot be said for conduct *before 1988.* That conduct, if subject to penalty when ft occurred, would remain subject to penalty today at least, the ex post facto clause is no impediment The intervening period of immunity might be relevant to some issues, but would have no relevance to the ex post facto analysis.

It is at least arguable that defendant's most culpable conduct *as to this plaintiff took* place during the 1960s, while plaintiff was being induced as a teenager to become thoroughly addicted to cigarettes. The jury may well have imposed punitive damages

entirely on the basis of that conduct, or on other conduct prior to 1988. We are directed to no evidence that defendant requested an instruction informing the jury that ft could not award punitive damages based on conduct during the time the immunity was in effect (the immunity window). Indeed we are directed to no evidence that defendant ever sought to separate the ex post facto issue, as ft arose under section 1714.45, from the claim of a total defense based on that statute. Since the ex post facto argument could at most warrant relief affecting punitive damages, and in that regard only to limit the evidence that the jury could consider, ft was not adequately presented by a motion for nonsuit, and is not properly before us.

*E. Application to Present Case.*

We have concluded that the 1998 amendments to section 1714.45, and particularly the addition of subdivision (f) to that section, represent a clear expression of legislative intent that such immunity as existed under the original statute be repealed or abolished with respect to at least some past events and claims against tobacco companies. We need not decide whether some claims remain barred, or where the line lies between those that may be barred and those that may proceed. Subdivision (f) explicitly contemplates that some cases may proceed even though they were "brought" before the amendments took effect. This case was "brought" *after* the amendments took effect, and so far as has been shown on appeal, after the "accrual" of plaintiffs cause of action for limitations purposes. If subdivision (f) does not require the adjudication of *this* case "on [its] merits, without the imposition of' the former "statutory bar or categorical defense," then we fail to see

how that subdivision can serve any purpose whatsoever.FN6

We conclude that section 1714.45 was not a defense to this action.

## II. FEDERAL PREEMPTION.

Defendant contends that many or all of the legal grounds on which the jury was permitted to impose liability were preempted by the 1969 Act. The only specific errors suggested are that (1) the court erroneously permitted the jury to consider evidence made inadmissible by the 1969 Act, and (2) the trial court gave an instruction overstating the

extent to which the jury could find liability consistent with federal law.FN7

The suggestion of evidentiary error is too vague for appellate consideration. No particular ground of exclusion is offered. We may *infer* that defendant relies on the premise that preemption rendered certain evidence irrelevant, but we will not address errors at the very nature of which we are forced to guess. Furthermore defendant makes no attempt to establish that any pertinent objection has been preserved for appeal by timely interjection in the trial court. (See Evid. Code, § 353.) We therefore pass this claim without further consideration.

Defendant waived much of its instructional objection by *express consent and invitation*. Defendant stipulated in open court that all instructions actually read to the jury were given at the "request and the invitation" of both parties except insofar as objections were embodied or expressed (1) in certain dispositive motions denied just before the stipulation was entered; (2) by express statement immediately *after* entry of the stipulation; or (3) immediately after the reading of instructions, insofar as any party might assert that the instructions as read did not

conform to those called for by the stipulation.

Defendant does not claim to have asserted federal preemption as a ground for any of the motions to which the stipulation referred, and appears not to have done so.

reason since preemption by the 1969 Act furnishes no defense to claims arising before its effective date. As for express objections voiced *after* the stipulation was entered, defendant lodged exactly one: namely, that the instructions were erroneous insofar as they allowed a verdict for plaintiff based on a theory of *conspiracy to conceal* after July 1, 1969. Counsel stated that defendant's "only objection" was that the instructions failed "to *incorporate the July], 1969 limitation* as it relates to the *conspiracy to conceal* claim." (Italics added.)

No party will be heard to complain of an error it invited. (*Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 121 Va party cannot successfully take advantage of error committed by the court at his request."]; see *Lynch v. Birdwell (1955)* 44 Cal.2d 839, 847.) Defendant is not relieved of this rule by Code of Civil Procedure section 647, which states that jury instructions are among judicial actions "deemed excepted to" without an express exception. (Code Civ. Proc., § 647.) The statute only means that "an appellant is deemed to have excepted to the instructions *he has not requested or agreed to.*" (*Pugh v. See 's Candies, Inc.* (1988) 203 Cal.App.3d 743, 759, italics added; see *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, *1653-1654, 1655; id.* at p. 1653, quoting *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686 ["The invited error doctrine applies 'with particular force in the area of jury instructions.' "1.)

By the express terms of the stipulation, defendant "request[ed] and invit[ed]" the instruction complained of except insofar as it allowed recovery for *conspiracy to conceal* after 1969. Defendant cannot enlarge this objection on appeal so as to argue that the jury was improperly

permitted to consider other theories in connection with post-1969 events and conduct.

With the issue thus narrowed, we find it unnecessary to decide whether the instruction accurately states the scope of federal preemption because it is impossible to say that the verdict was probably affected by any cognizable error. "To prevail on a claim of instructional error, the appellant must show a reasonable probability of a more favorable result in the absence of the error." *(Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1313.) In considering whether it"' "seems probable" that the error "prejudicially affected the verdict," ' " a reviewing court "should consider not only the nature of the error. . ., but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' "*(Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 983, quoting *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580-581.) The burden is on the complaining party to "demonstrate [that] a miscarriage of justice arose from the erroneous instruction." *(Rutherford, supra,* 16 Cal.4th at p. 983.)

Defendant's showing here falls far short of demonstrating that an instruction barring liability for conspiracy to conceal after 1969 would probably have affected the outcome. The jury found for plaintiff on *all eight* legal theories embodied in the instructions, i.e., (1) supplying a product tat failed to perform as safely as an ordinary consumer would expect it to perform; (2) supplying a produot before 1969 while failing to give adequate warning of its dangerousness; (3) simple negligence; (4) breach of express warranty; *(5)* intentional misrepresentation; (6) fraudulent concealment; (7) fraudulent promise; and (8) negligent misrepresentation. The jury also found that defendant committed conspiracy to defraud by concealment, suppression, or misrepresentation of the health effects of cigarette

smoking. Only one of these findings (conspiracy to commit fraudulent concealment) is affected by the alleged error before us, and it is only partially affected; a holding in defendant's favor would only mean the jury could not find for plaintiff on that theory on the basis of post1969 conduct. On the face of the special verdict alone, it appears unlikely that such a limitation would have had any effect on the ultimate finding of liability.

Defendant argues that the court's error with respect to preemption was prejudicial in that it caused the court to "improperly allow into evidence a mass of documents and testimony" concerning post-1969 advertising, failures to warn, and concealment of health risks. This is not a showing of "prejudice," but a back-door attempt to charge evidentiary error without laying the necessary foundation. (See Evid. Code, § 353.) Defendant makes no coherent showing that this evidence was not admissible for a proper purpose unrelated to concealment, e.g., to establish scienter in support of a claim for fraud. Fraud is outside the preemptive scope of the 1969 Act ( *Cz~oione* i'. *Liggett Group, Inc.* (1992) 505 U.S. 504, 528 *(Cipoione).)*

Defendant's next claim of prejudice is that in argument to the jury, plaintiff's counsel relied heavily on the supposedly preempted theory embodied in the challenged instruction. The passages cited by defendant, however, concern not conspiracy to conceal after 1969, but inadequate package warnings *before* 1969. In her first allusion to package warnings counsel said, *"/171/zen Patricia started smoking* at age 15 in 1961, there was nothing on the package. There was no warning;" (Jtalics added.) Counsel went on to argue that given the health risks posed by cigarettes, "you'd expect to see a skull and crossbones on ft (indicating). You'd expect to see the word 'Poison' on ft." Counsel next alluded to package warnings in connection with the first warning mandated in 1965, which counsel denounced as inadequate to deter plaintiff, by this time "a regular smoker [who] needed her cigarettes." Federal law posed no impediment to this argument, and

defendant does not suggest otherwise. *(Cz~oione, supra, 505* U.S at pp. 5 19-520.)

The specific passage cited by defendant echoed the earliest one in its reference to a skull and crossbones, and also followed, if at slightly greater distance, explicit references to plaintiff's original acquisition of the smoking habit Thus counsel conceded plaintiff's inability to specify a date and advertisement that caused her to begin smoking Marlboros. instead, counsel said, plaintiff had started smoking Marlboros because of a" 'cute guy at school' "who" 'looked like the Marlboro Man.' "Counsel then discussed defendant's use of the "Marlboro Man" as a symbol of independence particularly appealing to teenagers. To support this argument counsel read aloud from, apparently, a 1976 Philip Morris memorandum quoting a 1969 source which itself was apparently derived from an earlier source. Counsel argued that defendant exploited the symbolism of the Marlboro Man in order to induce teenagers to start smoking its products: "You don't become the No. 1 cigarette brand because you don't appeal to teenagers. That's the only way that you *get starters. Starters equal children.* And children do not make informed choices. [∂1 And had that [apparently indicating image of skull and crossbones] appeared on the pack, there's a greatly *[sic]* likelihood that somebody would see that, instead of a red and white color package that looks source.... That's the kind of warning that would be paid attention to.

Given this context we find ft disingenuous of defendant, at best, to characterize these remarks as having been made "without any distinction as to time." Indeed plaintiff's counsel told the jury, if somewhat elliptically, that ft could not predicate liability on a failure to warn after 1969. She went on to argue that the jury should find for plaintiff on a consumer expectations theory because the years preceding 1969 were "the time frame when [plaintiff] was... becoming hooked." Nothing in counsel's argument provides any basis to think that the jury relied on a theory of post-1969

conspiracy to conceal, or that had ft expressly forbidden to do so ft would have found for defendant on any other theory let alone all of them.

me STRICT PRODUCTS LIABILITY.

*A. Post-1969 Defect Under "Consumer Expectations Theory"*

Defendant contends that, for a variety of reasons, plaintiff was not entitled to judgment on her theory of strict tort liability for manufacture of a defective product. The jury was instructed by stipulation that this claim was established if, as pertinent to this appeal, plaintiff was injured as the result of a design defect in a product manufactured by defendant A product is defective, the jury was told, if(1) ft "fails to perform as safely as

an ordinary consumer would expect when used in an intended or reasonably foreseeable manner"; or (2) its use in a foreseeable manner involves a substantial danger not readily

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recognized by the ordinary user, the danger was known or knowable at the time of manufacture in light of generally recognized and prevailing scientific and medical knowledge, and the manufacturer "failed to give an adequate warning of that danger before July 1, 1969."

Defendant asserts that the trial court erred by permitting plaintiff's consumer expectations" claim to go to the jury without restricting ft to the time before the effective date of the 1969 Act We have serious reservations about the soundness of this argument, which sounds in federal

preemption, but we need not decide the issue because the point is barred by the parties' stipulation. (See section II, above.) Defendant argues that ft preserved the point by objecting to the portion of the instructions permitting the jury to find conspiracy to conceal after 1969. We fail to see how. Under the stipulated portions of the instructions the jury was free to return a verdict for plaintiff if ft found that the cigarettes smoked by her were *at any time* more dangerous than the ordinary consumer of cigarettes would expect. The jury Obviously made such a finding, which was supported by overwhelming evidence.

*B. Failure to Heed Warnings.*

Defendant asserts two related arguments to the effect that the presence of package warnings barred recovery on a products liability theory as a matter of law.

First, defendant contends that a product labeled with mandatory warnings "cannot" be found to "fail California's consumer expectations test." Insofar as this argument hints at federal preemption ft is not cognizable on appeal for the reasons already stated. We address ft solely as a proposition of California tort law. We find no persuasive basis for ft in the cases cited by defendant

In *Papike ". Tambrands Inc.* (9th Cir. 1997) 107 F.3d 737, cert. denied, the court affirmed a summary judgment for a tampon manufacturer on a claim that its product caused the plaintiff to suffer toxic shock syndrome. Defendant cites the case for its

disposition of the plaintiff's consumer expectations claim in two terse sentences:

"Tambrands' warnings met the federal requirements and Papike's design defect claim therefore fails the 'consumer expectation' test. To rule otherwise would allow the anomalous circumstance that a consumer is entitled to expect a product to perform more safely than its

government-mandated warnings indicate." (*Id.* at p. 743.) We are unpersuaded that these comments conform to California law, at least if taken outside the facts of that case. The warnings there might well have justified summary judgment for the defendant, because they explicitly notified the user of the very danger at issue and there is no suggestion of any countervailing evidence raising a genuine material issue of fact as to the likely expectations of consumers. The court's unilluminated statement that liability would be "anomalous" does not furnish a sufficient ground to take the matter from the jury.

In *Macias f". State of California (1995)* 10 Cal.4th 844, the court held that insecticide makers had no duty to issue warnings to the public in connection with an emergency insect eradication program, where the state had already issued warnings required by applicable statutes. (*Id.* at p. 857.) The holding did not rest on some presumption that the mandatory warnings were adequate as a matter of law, but on the injudiciousness of requiring private parti s to "interfere with" the state's emergency efforts. (*Ibi .*)

In *Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 1094, the court affirmed a

• summary judgment on the ground that the warning given there was sufficient as a matter of law, as shown by the evidence. Nothing in that decision suggests that a government-mandated warning categorically bars liability for a product otherwise shown to be more dangerous than ordinary consumers expect. Other cases cited by defendant do not purport to apply California law, and are not persuasive on the point at issue. (See *Haddix v. Playtex Family Products Corp.* (7th Cir. 1998) 138 F.3d 681, 686 [tampons came within Illinois rule for "simple products," and were not unreasonably dangerous given specificity of warnings and plaintiff's admission that she read them]; *Lescs v. Dow Chemical Co.* (W.D. Va. 1997)976 F. Supp. 393, 399 [federal labeling act *preempted*

claim under Virginia law that insecticide was defective under consumer expectations theory].)

Defendant's second argument concerning package warnings is that plaintiff's supposed failure to heed warnings precludes, as a matter of law, a finding that any defect in the product was a proximate cause of her injuries. This argument seems to proceed as follows:

(1) Where a product bears government-mandated warnings, they must be presumed sufficient to apprise the user of the steps necessary to avoid injury; (2) where a plaintiff fails to take such steps, his or her conduct is a superseding cause of any injury she suffers; (3) had plaintiff quit smoking in compliance with package warnings, "she almost certainly would not have developed lung cancer from smoking"; therefore (4) any defect in defendant's product was not a proximate cause of plaintiff's injuries.

In support of the first point defendant cites four cases for a proposition they do not remotely support, i.e., that "[u]nder California law, a plaintiff's failure to heed a product warning negates any potential liability because, under such circumstances, the plaintiff's own conduct, not a product defect, is the proximate cause of the plaintiff's injury." In *Schwoerer v. Union Oil Co.* (1993) 14 Cal.App.4th 103, 110-111, the court reversed a

summary judgment for a defendant based on its claim that its product warnings were adequate as a matter of law; the court assumed the proposition, conceded by the plaintiff, that "where *adequate* warnings have been passed along from manufacturer or seller to the ultimate consumer, there can be no liability." (Italics in original.). It cited *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 174, 178, where a jury verdict for a ski binding maker was affirmed over the plaintiffs argument that the defendant breached a *duty to warn* as a matter of

law; the court held that the defendant's duty was discharged by giving appropriate warnings to the ski shop that installed the bindings. Similarly, in *Carmichael ~ Rein* (1971) 17 Cal.App:3d 958, 989, 991, the court affirmed a jury verdict for a drug manufacturer despite a failure to warn the plaintiff where adequate warnings were given to her physician.

Defendant apparently cites *Cakes f". E. I Du Pont de Nemours & Co, Inc.* (1969) 272 Cal.App.2d 645, 649, for its general discussion of failure to warn as a species of product defect Aside from the inaptness of this discussion to the question of proximate cause, portions of the decision contradict defendant's position. Most notably, the court said that a product bearing an adequate warning," *' which is safe for use ~f it is followed,* is not in defective condition, nor is ft unreasonably dangerous.' "(*Ibid.*, quoting Rest.2d Torts, §402A, com. *j*, italics added.) Defendant points to only one warning here that ever gave any instruction to be "followed" a statement that "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health." This warning was not adopted until October 12,1984, and was not required to appear until one year after enactment (Pub.L. No. 98474 (Oct. 12, 1984)98 Stat 2202.) Plaintiff had then been smoking for some 23 years. We are directed to no evidence concerning the medical probability that quitting in 1985 would have affected the course of her illness. In any event *Cakes* does not support the point for which ft is cited.

Likewise *Luque ri'. McLean* (1972) 8 Cal.3d 136, 145, is concerned not with proximate cause but with the kind of *contributory negligence* that will constitute a defense to a product liability claim." 'For such a defense to arise,' "the court wrote," 'the user or consumer must *become aware* of the defect and danger and *still proceed unreasonably* to make use of the product' "(*Ibid.*, italics added; see *idi* at p. 145, fn. 9 [discussing Rest.2d Torts, § 402A, com. *n*, and other authorities on" 'assumption of risk' "in strict liability cases].) Defendant apparently waived any such defenses;

the stipulated instructions included none on these subjects. The *Luque* decision therefore has no bearing on this appeal.

*C. Reliance on Expert Testimony*

Defendant also contends that the jury's finding of liability on a consumer expectation theory rests impermissibly on expert testimony. This argument depends upon a misconstruction of *Soule v. General Motors Corp. supra,* 8 Cal.4th 548 at p. 567, 4 concerning the general impropriety of relying on expert witnesses to establish the expectations of the ordinary consumer. The actual holding is that" *where the minimum* 4 *safety of a product is within the common knowledge of lay jurors,* expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect." *(Ibid.,* italics added.) In a footnote, the court confirmed, in the context of "specialized" products, the implied corollary of the above rule: "[I]f the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper." *(Id.* at pp. 568-569, fa. 4.) This rationale would seem to authorize the admission of expert testimony at least for the purpose of establishing what *smokers* expected at various times *in the pas4* most particularly during the critical period when plaintiff began to smoke and became "hooked."FNS Defendant extracts from *Soule* the proposition that "[b]y using experts, plaintiff disqualified herself as a matter of law. from relying on a tconsumer expectations' theory..

." In other words, by merely proffering expert testimony, plaintiff waived her consumer expectations theory. The proposition is absurd if only because expert witnesses may well be called on issues having nothing to do with consumer expectations. *(Soule, supra,* 8

Cal.4th at p. 567.) Furthermore, the argument again rests on supposed evidentiary and 4

instructional errors that are not separately stated or coherently demonstrated on appeal and 3 are not shown to have been raised below. If defendant's argument was sound, the remedy was to exclude the expert testimony or withhold the consumer expectations theory from the jury not to suffer admission of the testimony, stipulate to the jury's consideration of the theory, and then seek reversal on appeal.

*D. Inherently Dangerous Product: Comment i and BAJI No. 9.00.6.*

Defendant next asserts that plaintiff's product liability claims were barred by the doctrine stated in comment *i* to section 402A of the Restatement Second of Torts (comment () and

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Bail No. 9.00.6. Two distinct errors seem to be asserted. One is that the claims were barred as a matter of law and thus, by implication, should not have been submitted to the jury at all. The other is that the court committed "instructional error" by refining a supposed request to give Bail No. 9.00.6.

The claim of instructional error has been waived. Defendant asserts in its reply brief that ft requested the instruction in connection with all of plaintiff's product liability theories. No such request is cited. Instead, at the cited point in the transcript, *both counsel agreed* with the court's statement "that the defense did request that the court give 9.006 *[sic] on the risk/benefit prong* of Barker versus Lull." This was an allusion to a specific theory of product liability asserted by plaintiff. (See *Barker ". Lull Engineering Co.* (1978)20 Cal.3d 413.) In response to that

limitation, plaintiff expressly abandoned the *Barker* theory. As a result, the court did not give Bait No. 9.00.6. If defendant was in any way surprised by this, ft was required under the parties' stipulation to object no later than immediately after the instructions were read. It did not do so.

In the face of this record defendant states, somewhat astonishingly, that "[flor reasons not explained on the record, the trial court was willing to give BAJI 9.00.6 had plaintiff proceeded to trial on a risks/benefits design defect theory, but refused to give the instruction on the consumer expectations and failure to warn case... ." The court did not "refuse" to do anything; ft omitted an instruction which ft apparently believed defendant had only requested conditionally. Its reasons were anything but unexplained: the condition under which defendant requested the instruction had ceased to exist. If the court was mistaken, ft was up to defendant to say so, not let the matter pass and then offer ft on appeal as grounds for a retrial.

This leaves defendant's argument that the doctrine embodied in comment *i* and Bait No. 9.00.6 entitled defendant to judgment *as a matter of law.* Defendant cites six motions or memoranda raising related points; none raises this specific argument. Nonetheless, this is the kind of argument which, if limited to its potential as a *complete bar* to liability, we may consider on appeal notwithstanding the failure to raise ft below.

The problem with defendant's many other arguments of similar nature is that they depend on factual predicates, such as package warnings, that do not pertain to the entire period at issue in this suit As a result they raise only a partial defense. If comment *i* actually raised a categorical bar, as defendant now contends, the bar might well extend to the entire period at issue. Defendant's argument fails, however, because to the extent comment *i* reflects California law, ft does not furnish a categorical defense but

a question of fact or multiple questions of fact for the trier of fact

Comment *i* is a gloss on the general rule that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer.... is subject to liability for physical harm thereby caused... ." (Rest.2d Torts, § 402A, subd. (1).) The entire point of comment is to emphasize and enlarge upon the requirement that the

product must be "unreasonably dangerous."FN9 This requirement "was added to foreclose the possibility that the manufacturer of a product with inherent possibilities for harm (for example, butter, drugs, whiskey and automobiles) would become 'automatically

responsible for all the harm that such things do in the world.' "(*Cronin* i'. .*LB.E. Olson Corp.* (1972) 8 Cal.3d 121, 132, quoting Prosser, Strict Liability to the Consumer in California (1966) 18 Hastings L.J. 9,23.)

In *Cronin, supra,* 8 Cal.3d at pp. *134-135,* the court held that the "unreasonably dangerous" requirement is not part of California's law of strict product liability. This holding remains good law. (See *Barker* r~• *Lull Engineering Co., supra,* 20 Cal.3d 413 at

p. 417; *Brown v. Superior Court* (1988)44 Cal.3d 1049, 1057; *American Tobacco, supra,* 208 Cal.App.3d 480, 489.) Indeed, except as modified by section 1714.45 (see section I, above), ft has been legislatively ratified. (§ 1714.45, subd. (d).) Defendant somehow acknowledges this while still asserting that comment 4 which serves only to illuminate this inapplicable requirement, states the rule applicable to this case. Defendant cites no California case since *Cronin* that has applied the comment or endorsed its application. (Cf.

*Harris v. Belton* (1968) 258 Cal.App.2d 595, 608; *Cakes* ". £ .L *Dii Pont de Nemours & Co., Inc., supra,* 272 Cal.App.2d 645,

648.)

Not only does comment *i* explicate a rule that is not part of our law, ft does not by its terms support the categorical bar to recovery defendant would have us adopt The comment states that to warrant liability, the product must be "dangerous *to an extent beyond that which would be contemplated* by the ordinary consumer." (Rest.2d Torts, § 402A, com. 4 italics added.) This invites a showing by an injured smoker that while cigarettes may have been generally known or believed to pose hazards, they were in fact far more dangerous than was "contemplated by the ordinary consumer." In arguing otherwise, counsel flatly misrepresents applicable authority. In the reply brief counsel writes, "*Under Comment 4 ft* is not necessary that the ordinary consumer know or understand every possible risk associated with smoking, so long as cigarettes are 'known to be unsafe.' *See American Tobacco,* 208 Cal.App.3d at p.490 (there is 'no requirement... that consumers fully appreciate all the risks involved')." (italics added.) The quoted passage actually states: "As to the second and third claims, there is no requirement *under this statute* [former §1714.45] that consumers fully appreciate all the risks involved in the use or consumption of the products within the purview of *this section.* In order to be covered *by this statute ft* is sufficient that the ordinary consumer knows the product is 'unsafe.' " *(American Tobacco, supra,* 208 Cal.App.3d at pp. 489-

490, fn. *5,* original italics omitted, new italics added.) The court then goes on to say that but for the statute, the situation could well be different: "Evidence that the *risks are greater than those anticz~ated,* either because the product contains unknown dangerous elements or because ft may be used in conjunction with substances that unknowingly increase the risks involved, *could possibly be used to support a claim that the product is defective* under the standards outlined in *Barker v. Lull Engineering Co., supra,* 20 Cal.3d 413 (see Discussion, *ante, at* fn. 4, p. 489).)" *(Ibid.,* italics added.)

Defendant has failed to demonstrate any entitlement to judgment as a matter of law on the authority of comment

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*E. Generally Recognized Danger: Comment].*

Next defendant contends that it should receive some kind of appellate relief on the authority of comment] to Restatement Second of Torts section 402A, which concerns the effect on a failure-to-warn theory of common knowledge of a product's risks. Defendant does not mention in this context any proceedings in the lower court by which this issue was raised or preserved for appeal. We observe, however, that it was one basis for a motion for judgment notwithstanding the verdict. Even viewing the brief as containing an adequate specification of error, the argument on this point is woefully deficient, as epitomized in the assertion that "because plaintiff knew of and accepted the risks of smoking, PM cannot be strictly liable to her." Plaintiff denied that she "knew of and accepted the risks of smoking" as they affected her, and indeed presented evidence that few people outside the research community and the tobacco industry appreciated the risks of smoking at the time she was becoming "hooked." In the absence of a compelling showing to the contrary, we presume the jury accepted this testimony and otherwise made any findings necessary to reject defendant's factual premise. Defendant's one-page argument on appeal does not include a compelling showing.

## IV. FRAUDULENT MISSTATEMENT.

*A. Misstatement.*

Defendant contends that plaintiff failed to establish two elements of her claims for fraudulent misstatement and fraudulent promise, i.e., a false representation of fact (or actionable false promise) and actual reliance by plaintiff.

As defendant puts it, plaintiff presented "no evidence of a misrepresentation of material fact" and "no evidence of actual reliance or causation."

A claim of "no evidence" is a claim of insufficient evidence to support the challenged findings. One raising such a claim assumes a "daunting burden." *(In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, 328-329.) We *must presume* that the record contains substantial evidence to support every finding necessary to support the judgment. *(In re Marriage of Fink* (1979) 25 Cal.3d 877, 887-888.) To overcome this presumption, the party challenging a finding "must *summarize the evidence* on that *point ,favorable and*

*unfavorable,* and *show how and why it is insufficient (Trailer Train Co. v. State Ed of*

*Equalization* (1986) 180 Cal.App.3d *565,* 587-588.)" *(Roemer v. Pappas* (1988) 203 Cal.App.3d 201, 208, italics added.) Where a party presents only facts and inferences favorable to his or her position, "the contention that the findings are not supported by substantial evidence may be deemed waived." *(Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.)

Defendant makes no attempt to provide a fair summary of the evidence on which the findings of fraudulent misrepresentation and reliance might (and presumptively do) rest. We recognize that the record is exceptionally large, the scope of proof vast, and the limitations on brief length constraining. Fairness might require relaxation of the foregoing requirement if defendant had made a good faith effort to comply with ft by at least identi1~ing the evidence *most* favorable to the judgment Defendant, however, has made *no* attempt to set forth the evidence most supportive of the finding and to "show how and why ft is insufficient." *(Roemer v. Pappas, supra,* 203 Cal.App.3d at p. 208.)

Our review of the record satisfies us that there was substantial evidence, which defendant does not cogently dispute for purposes of this appeal, that ft engaged in a conscious, deliberate scheme to deceive the public, and individual smokers and potential smokers (many or most of whom ft knew to be adolescents), about the health hazards and addictive effects of cigarette smoking. The jury could properly find that commencing no later than 1953 and continuing at least until the time of plaintiff's diagnosis, defendant and other cigarette manufacturers acted both in concert and individually to issue innumerable false denials and assurances concerning the dangers of smoking, deliberately fostering a false impression by the public, or more precisely by smokers and prospective smokers, that assertions of health risk were overblown products of puritanical prejudice, that any real hazards had yet to be shown, and that the industry itself was acting and would act diligently to discover the scientific truth of the matter and promptly disclose its findings, good or bad. The jury could also find that plaintiff heard of these false assurances and denials, if only indirectly, and was falsely led to believe, as defendant intended, that there was a legitimate "controversy" about whether cigarettes actually caused cancer or carried any other serious health risks. As a consequence of that information and the distorted judgment brought about by addiction, she was unaffected by reports of adverse health effects because she was unpersuaded they were true or reliable enough to warrant any action by her.

Defendant contends that many of the statements alleged by plaintiff were matters of opinion and thus not actionable. This argument relies on the general rule that statements of opinion will not support an action for fraud, while ignoring the exception on which the jury was instructed, and which it presumptively found applicable to any statements of opinion:" 'Ii W]hen one of the parties *possesses*, or assumes to *possess*, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he

may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, tough ft might be regarded as but the expression of an opinion if made by any other person, is not excused if ft be false.' " (*Harazim* is. *Lynam* (1968) 267 Cal.App.2d 127, 131 quoting *Haserot* is. *Keller* (1924)67 Cal.App. *659,* 670-671.) Further, if a statement ofopinion" 'misrepresents the facts upon which ft is based or implies the existence of facts which are nonexistent ft constitutes an actionable misrepresentation.'~~ (*Id.* at p. 133, quoting *Seeger* is. *Odell* (1941) 18 Cal.2d 409,414.) The jury here was entitled to find that insofar as any of defendant's statements constituted opinions, they implied the existence of superior knowledge as well as a state of facts that did not exist.

*B. Reliance and Causation.*

Defendant contends that even if plaintiff showed an actionable misrepresentation, she failed to show that she actually and reasonably relied on anything defendant said or failed to say. Likewise defendant suggests that plaintiff failed to show the closely related element of causation.

Defendant incorrectly asserts that "[t]here is no evidence that plaintiff ever saw or heard..

. any... statements by [defendant] (or other cigarette manufacturers) relating to the health risks of smoking." Defendant ignores plaintiff's testimony that while she recalled "listening and seeing things that the Surgeon General was saying," she was also aware "that *the tobacco companies were saying difference"* (Italics added.) Thus, she testified, package warnings never "faze[d] me one way or the other. I wasn't going to give the cigarettes up at that point" The jury was entitled to find that by this time, in her addicted state, plaintiff was easy prey for defendant's disinformation campaign and readily clutched at the industry's caricature of objective inquiry.

Contrary to defendant's implicit contention, plaintiff did not have to prove that she heard these matters directly from defendant, or from any of its coconspirators. It was enough that the statements were, as the jury was entitled to find, issued to the public with the intent that they reach smokers and potential smokers, and that plaintiff, as a member of that class, heard them. As the jury was correctly instructed, "One who makes a misrepresentation or false promise or conceals a material fact is subject to liability if he or she intends that the misrepresentation or false promise or concealment of a material fact will be passed on to another person and influence such person's conduct in the transaction involved."

Rest.2d Torts, § 533; *Geernaert is. Mitchell* (1995)31 Cal.App.4th 601, 605 [summarizing principles and noting that "if defendant makes the representation to a particular class of persons, he is deemed to have deceived everyone in that class']; *Mirkin is. Wasserman* (1993) 5 Cal.4th 1082, 1098 [confirming principle but noting inapplicability where plaintiff unaware of misrepresentation]; *Shapiro* is, *Sutherland* (1998)64 Cal.App.4th 1534, 1548 [citing and following *Geernaert]; Committee on Children '~s Teleisision, Inc.* is. *General Foods Corp.* (1983)35 Cal.3d 197,219 - [applying principle to misleading advertisingj; cf. *Gawara is. United States Brass Corp.* (1998)63 Cal.App.4th 1341, 1351, 1355 [indirect reliance not shown by evidence].)

Here defendant's and its coconspirators' innumerable misrepresentations concerning the unsettled state of relevant knowledge, and by implication the unreliability of evidence of a cigarette-cancer link, were made with the intention and expectation that they would circulate among and influence the conduct of *all* smokers and prospective smokers. They were passed topl~~ who knew that while the Surgeon General was saying one thing, the industry was "saying different" This brings her within the cited rule.

Defendant attempts to characterize and then attack plaintiff's fraud theory as "fraud on the market," a concept developed under federal securities law, which the court in *Mirkin, supra,* 5 Cal.4th 1082, refused to import into our common law of torts. "Fraud on the market" has nothing to do with this case. Its essential principle is that an investor in a security, the price of which has been influenced by fraud, may be deemed to have relied on the fraud. (*Id* at. p. 1089, citing *Basic Inc. is. Leisinson* (1988) 485 U.S. 224,241-247, 250.) Neither that rule nor its context-specific rationale has any bearing on fraud contended to have been practiced on a vast group of consumers, causing many of them to sustain personal injuries. The facts of this case might be more accurately called "fraud on the public," but even that ft is misleading. Plaintiff herself was an intended target and victim of the fraud, through precisely the mechanisms of transmission intended

by defendant and its coconspirators. Defendant has failed to show any defect in the jury's

verdict on the affirmative fraud claims.

## V. BREACH OF EXPRESS WARRANTY.

Defendant contends that plaintiff offered "no evidence of an express warranty," such that the judgment in her favor "on this claim" must be reversed. The gist of this argument is that plaintiff showed no express "affirmation of fact," as distinct from an implication, opinion, or general commendation of goods, of which she was personally aware, or on the basis of which she personally acted.. Defendant also asserts that there was insufficient evidence to establish that any warranty the jury might have found was actually the basis of any bargain between plaintiff and defendant

Defendant has once again failed to meet its burden as a party challenging the sufficiency of the evidence. To cite the most obvious example, defendant relegates to a

footnote plaintiff's simplest evidence of a direct, express warranty from defendant Plaintiff testified that at some point prior to the late 1980s she began to hear that "low-tar cigarettes were better" and that by smoking them "[y]ou wouldn't get as much tar and nicotine." Accordingly she decided to" 'check into this,' "thinking," 'Maybe I'll change from the Reds to the Lights.' "She "did indeed call the Marlboro, Philip Morris company and expressed, you know, my concerns as to, 'Is ft really true? Is there less tar in this or less nicotine?' ¶ And I was assured at the time that ifI was concerned that, yes, I could switch to the Lights, which presented a real problem, because approximately a month or two after switching to Lights, I went from two packs of cigarettes to three and a half packs of cigarettes a day."

Defendant fails to "show how and why [this evidence] is insufficient" (*Roemer is. Pappas, supra,* 203 Cal.App.3d at p. 208) to establish an express warranty. In a footnote ft mischaracterizes the testimony as confirming only "that *plaintiff wanted to smoke cigarettes with less tar and nicotine,* she could switch to light cigarettes." (Italics added.) We presume the jury did not adopt this interpretation. The least that the testimony reasonably could be understood to mean was that defendant represented to plaintiff that she would take in less tar and nicotine if she switched to Lights. This proved false (the warranty was breached) when (as defendant knew was common) plaintiff simply increased the number of cigarettes she smoked.

Further, even though plaintiff's trial testimony about this conversation was somewhat ambiguous, ft supported an inference that defendant's representative expressly assured plaintiff that Lights eliminated or reduced whatever risks smoking might otherwise pose. That is, the assurance as stated at trial was that switching to Lights would address some unspecified "concern[s]." The jury could infer that the "concerns" discussed were related to what plaintiff said motivated the call, i.e., that she had heard "low-tar cigarettes were better." By "better," the jury could infer,

plaintiff meant "healthier."

Even if defendant had carried its burden of showing that the record lacks substantial evidence of an express warranty, no prejudice appears. We see no reasonable likelihood that the jury's consideration of this theory had any effect on its findings on other matters, notably the fraud and strict liability claims.

## VI. FRAUDULENT CONCEALMENT.

Defendant contends that the jury verdict for plaintiff on the issue of fraudulent concealment cannot be sustained because (1) plaintiff and the public were aware of the health risks of smoking at all relevant times; (2) "plaintiff did not prove" that she relied on any mistaken beliefs that would have been dispelled by the posited disclosures; and (3) any reliance would have been unreasonable as a matter of law.

Again defendant shirks its burden as a party challenging the sufficiency of the evidence to support a particular finding in this case the jury's implied finding that neither plaintiff nor the public was aware of, or adequately appreciated, the health risks of smoking. Defendant singles out two favorable passages of deposition *testimony* and uses them to assert that plaintiff "was aware of the material fact that she claims was not disclosed to her that smoking cigarettes can damage one's health." In the first plaintiff answered affirmatively the question whether "throughout the time that you smoked, you had *heard that there were risks* associated with smoking, *or* you had heard people say things about smoking and health; you just didn't want to believe them." (Italics added.) In the second she acknowledged that there was a warning on every pack she picked up after 1966. Neither of these passages constitutes a binding or compelling admission that when plaintiff began smoking in 1961, or at any particular time thereafter, she knew of, understood, or appreciated the

dangers of cigarrette smoking. In any event, citing favorable testimony is not enough; defendant must cite the evidence supporting a *contrary* finding the finding presumptively made the by the jury and show "how and why it is insufficient." (*Roemer v. Pappas, supra,* 203 Cal.App.3d at p. 208.)

Plaintiff testified, among other things, that when she began smoking at age 15 she did not "understand there were dangers about smoking cigarettes." Defendant disregards this particular question and answer, but goes on to assert that plaintiffs trial testimony "is simply not credible." It then singles out testimony in response to the question, "When were you first aware that cigarette smoking could cause lung cancer?" Plaintiffs actual response was, "I think my first complete awareness that cigarette smoking could cause lung cancer was when a doctor came in and told me that I had lung cancer." She testified that she was "baffled" by this information, which she "made them repeat to me several times." She continued: "I just know that I must have seen the warnings, but to be fully aware or believe that this really did cause this, it didn't register in my brain." She was inclined to believe, and preferred to believe, that her lung cancer was the result of asbestos exposure, and she repeatedly questioned doctors about this alternative possibility. So complete was her "denial," as she repeatedly described it, that even after her diagnosis she still sought ways to disbelieve it, in part to keep open the option of taking up smoking again some day. Thus when a friend brought to her attention a report that cigarettes contained ammonia a substance to which plaintiff had a conditioned aversion based on a childhood trauma plaintiff denounced the report as" 'some kind of propaganda against the tobacco company.

We see nothing in this testimony that permits us to substitute our own judgments of credibility for those of the jury. Based on this and other evidence, the jury was entitled to find that plaintiff, first because of her youth and inexperience and then because of her addiction, *did not*

*believe* the package warnings but thought all information about the health risks of smoking was "propaganda" against the tobacco companies.

Nor will we debate the evidentiary minutiae over whether the *public* adequately appreciated the health risks of smoking to excuse defendant from a duty to disclose. Instead we will presume in support of the judgment that the jury found on substantial evidence that even if there was ample information in the public domain to convince reasonable observers of the hazards of smoking, defendant and its fellows deliberately interfered with the *assimilation* of that information, particularly by smokers and prospective smokers. It was this class to whom defendant presumably owed a primary duty of disclosure. Nonsmokers were far less directly affected by the issue.

At least one of the cases cited by defendant on this subject and the only California one actually supports an argument in favor of the judgment. In *Wawanesa Mutual Ins. Co. v. Matlock* (1997) 60 Cal.App.4th *583, 587,* fn. 3, the court noted that tobacco had long had detractors but acknowledged that much of the opposition seemed to rest on concerns of morality or aesthetics, not on any demonstrated health hazard. The court cited and defendant apparently placed in evidence here King James I's famous 1604 "Counterblaste to Tobacco," in which he pronounced smoking "[a] custome loathsome to the eye, hatefull to the Nose, harmefull to the brain, daungerous to the Lungs, and in the blacke, stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomless." By the late nineteenth century, as the *Wawanesa* court observed, smoking had come to be associated with "general licentiousness" and "cheesy dens of iniquity." (60 Cal.App.4th at p. 587, fn. 3.) This history of moral opprobrium provided fertile ground for the tobacco companies' disinformation campaign, since it predisposed addicted smokers (and adolescent presmokers chafing under adult authority) to attribute criticism of smoking to puritanical prejudice rather than sound scientific evidence.

It hardly establishes widespread knowledge among smokers or others that, as a matter of scientific and medical fact, smoking poses severe risks to health.

Defendant likewise fails to carry its threshold burden on the subject of actual and reasonable reliance. Defendant states, "plaintiff effectively admitted that any disclosures by regarding the health risks of smoking would have been immaterial to her decision." But plaintiff plainly testified that she was unmoved by package warnings only because they failed to indicate *how* dangerous cigarette smoking was, and because she knew they did not originate from the companies. As plaintiff said. "[There's a lot of different degrees of danger. It's dangerous to walk across the street. When you're hooked on something and you have the need to have that, you don't you don't listen to that type of warnings. [∂1

*Maybe the tobacco company had come out and said: 'Our product is dangerous.'* [1] But I was listening and seeing *things* that the Surgeon General was saying that the tobacco companies were saying different" (Italics added.)

Defendant has failed to carry its burden of showing that there was "no evidence," or insufficient evidence, to support each finding necessary to the verdict on the fraudulent concealment theory.

## VIL NEGLIGENCE.

We do not address defendant's attack on the jury's finding of simple negligence because the judgment is amply supported by other theories of liability and nothing that occurred in connection with the negligence claim is reasonably likely to have affected the outcome as to those claims.

## VIII. PUNITIVE DAMAGES.

*A. Sufficiency of Evidence.*

Defendant contends that "There Is No 'Clear and Convincing' Evidence to Support the Predicate For Punitive Damages." This is another challenge to the sufficiency of the evidence, and once again defendant has failed to carry its burden on appeal.

The jury may award punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, §3294, subd. (a).)" 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *(Id.*, subd. (c)(1).)" 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." *(Id.*, subd. (c)(2).)" 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." *(Id.*, subd. (c)(3).)

We assume that the correct standard for review of a finding of oppression, fraud, or malice is as stated in *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60, i.e., whether evidence of sufficient substantiality was presented that a reasonable jury "could find [that] the plaintiff hard] presented clear and convincing evidence on the disputed issue." (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287 ["all we are required to find is substantial evidence to support a determination by clear and convincing evidence"]; cf. *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576 ["clear and convincing evidence" standard guides only trial court and does not affect reviewing court, which continues to apply the substantial evidence standard]; *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 911.) Under this standard, however, defendant still bears the burden of fairly summarizing the evidence *favoring* the challenged finding and affirmatively

demonstrating its insufficiency. (See *Roemer v. Pappas, supra,* 203 Cal.App.3d at p. 208). Defendant's presentation fails to fairly characterize the most damaging evidence or address its effect.

Defendant first seeks to categorically exclude two bodies of evidence from consideration in support of the punitive damage award. First, it disingenuously asserts that conduct after July 1, 1969, cannot be considered in light of the federal preemption "with limited exceptions" of claims based on conduct after that time. The primary "limited exception" is that the 1969 Act does not affect state law claims for fraud. *(Cipollone, supra, 505* U.S. at p. 528.)

Next defendant asserts that conduct immunized by section 1714.45 should not be considered in support of a punitive-damages award. Such an argument would merit analysis only if defendant raised a concrete possibility that the verdict was infected by consideration of conduct within the specified period. Insofar as defendant contends that the 11-year "immunity window" created by section 1714.45 retroactively and irrevocably deprived conduct predating that window of its potency to support a punitive damages award now that the immunity has been repealed, we reject the contention as lacking any discernible support in law, logic, fairness, or public policy.

Defendant then turns to a critique of the trial court's opinion explaining its denial of defendant's motion to set aside the punitive damages award. The court found the evidence "fully sufficient" to support express or implied jury findings that defendant willfully and consciously marketed its cigarettes to teenagers, violated promises and representations to the public by concealing and suppressing information known to it concerning the addictive and harmful properties of its product, and "affirmatively misled the American public by advertising that there was genuine and legitimate controversy in the scientific community on the subject of smoker health, when in fact there was no such controversy." It is in

response to these points that defendant largely abandons any attempt to fairly summarize or address the evidence underlying the judgment

Defendant asserts that the finding of "targeting of teenagers" rested on the rationale that "Most people who become cigarette smokers begin smoking by age 19,so cigarette companies must target teenagers." This is not a fair characterization of the record or of the trial court's opinion. Defendant attacks various documents cited by the trial court on the ground that they were not shown to have been *authored* by a corporate officer, director, or managing agent But even if we accept this premise which again, is not demonstrated but simply asserted as a fact the primary relevance of these materials was not to show conduct by their authors but as admissions of corporate conduct and circumstantial evidence of the mental state of corporate officers, directors, and managers.FN1O As defendant concedes, the particular document it most vigorously attacks was a draft presentation to defendant's *Board of Directors.* It was not deprived of all evidentiary force by its "draft" status. A "draft" is defined and understood as" [a] preliminary sketch or rough form of a writing or document, from which the final or fair copy is made." (4 Oxford English Dict. (2d ed. 1989) p. 1008.) From the existence of a draft, the existence of a "final fair copy" may be reasonably *inferred.* And where a draft document is relevant for its *central theme* (rather than some incidental feature), ft may be inferred that the theme survived into any final version.

Defendant offers the notion that marketing its products to "teenagers" does not establish reprehensible conduct because 18 and 19-year olds are "teenagers" who may lawfully purchase and consume cigarettes. The argument is unsound. Moreover none of the documents cited by the trial court limits itself to 18 and 19-year olds. They discuss smoking habits and "market penetration" among children as young as 12 without the slightest acknowledgment of legal niceties such as defendant now asserts. One

document reviews the history of Marlboro's success and the business risks posed by a coming decline in the number of teenagers, and includes the statement, "Because of our high share of the market among the *youngest* smokers, Philip Morris will suffer more than the other companies... ." (Italics added.)

Defendant asserts that its attempts to prevent the official classification of nicotine as a "drug" cannot support an award of punitive damages. Defendant directs us to no indication that plaintiff the trial court, or the jury placed any reliance on such conduct. It is true that plaintiff played a videotaped excerpt from testimony before Congress in which a Philip Morris executive apparently stated that he did not believe nicotine to be addictive. Elsewhere in its brief defendant contends that this evidence was inadmissible. We do not decide the question because we do not think there is any significant possibility that ft affected the outcome.

Defendant contends that its failure to disclose that cigarettes are addictive does not support a punitive award because "it is, at bottom, a quibble over definitions." If so, it is a quibble of which the tobacco industry is the chief author and beneficiary. The question is not whether the term "addictive" applies to cigarettes in some narrow medical sense but whether a reasonable effort should have been made to bring home to defendant's mostly teenage "starters" market the extreme difficulty they were likely to encounter in any future attempt to~p smoking. To borrow language used in 1965 congressional hearings, "For many people, the choice to smoke, once it has been made, may as a practical matter be irrevocable." (Cigarette Labeling and Advertising Hearings before Sen. Coin. on Commerce on Sen. Nos. *559* and *547*, 89th Cong., 1st Sess., at p. 500 *(1965).)*

We have examined defendant's remaining points concerning the evidence of oppression, fraud, or malice, and find them to be insufficient to carry defendant's

burden of showing that the finding on that subject was marred by error.

*B. Size of Award.*

Defendant contends that the punitive damages award is excessive for two interrelated reasons: first, that ft was the product of passion and prejudice, and second, that the objective factors by which such an award is reviewed on appeal all point toward a finding that ft exceeds the amount necessary and proper to punish and deter. Defendant invokes California authorities applying the statutory and common law of this state, and federal authorities holding that punitive damage awards implicate constitutional concerns.

Under California law, a punitive damage award may be reversed as excessive "only if the entire record, viewed most favorably *to* the judgment, indicates the award was the result of

• passion and prejudice." *(Stevens v. Owens-Corning Fiberglas Corp., supra,* 49 Cal.App.4th 1645, 1658.) "The purpose of punitive damages is a public one to punish wrongdoing and deter future misconduct by either the defendant or other potential wrongdoers. The essential question for the jury, the trial court, and the appellate courts is whether the amount of the award substantially serves the public interest in punishment and deference. The California Supreme Court has established three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are reasonable in relation to actual damages; and (3) the defendant's financial condition. [Citations.] The wealthier the wrongdoer, the larger the punitive damage award must be to meet the goals of punishment and deterrence. [Citations.]" *(Ibid.)*

In addition, 'The Due Process Clause of the Fourteenth Amendment [to the United States Constitution] prohibits a State from imposing a' "grossly excessive"' punishment on a tort feasor." *(BMW of North America, Inc. 's'. Gore* (1996) 517 U.S. *559, 562 (BMW).)* This constraint apparently rests on issues of notice. *(Id.* at p. *574:* ["Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity

- of the penalty that a State may impost"].) It is at least arguable, and we assume for purposes of our analysis, that in assessing whether an award comports with these constitutional principles, we must review the trial court's determination de novo. *(Cooper*

- *Industries, Inc. 's'. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, ___ [121

S.Ct. 1678, 1683, 1685-1686] *(Cooper Industries)* .)FN11 The factors to be considered are (1) the degree of the defendant's culpability, i.e., the reprehensibility of his or her conduct, (2) the ratio between the punitive award and the harm to the victim caused by the defendant's actions, and (3) the sanctions imposed in other cases for comparable misconduct. *(Cooper Industries, supra,* 121 S.Ct. at pp. 1685-1686, 1688; see *BMW~, supra,* 517 U.S. at p. *575.)*

Addressing the constitutional issues first, we do find defendant's conduct as reflected in the present record reprehensible. The record reflects that defendant touted to children what ft knew to be an addictive and cumulatively toxic product while doing everything ft could to prevent addicts and prospective addicts from appreciating the true nature and effects of that product. The expected and intended result of this conduct was that millions of youngsters were persuaded to, and did, enslave themselves to a habit that was likely to, and did, bring

many of them to an early loss of the enjoyment of life, illness, and death. We agree with the jury and the trial court that only a very substantial award was sufficient to reflect the moral opprobrium in which defendant's conduct can and should be held.

Nor do we find the award "grossly excessive" by virtue of the 17:1 ratio between punitive damages and compensatory damages. While acknowledging the absence of any "bright line" mathematical test, defendant cites dictum from *Pac{flc Mut Life Ins. Co. v. Haslz~* (1991) 499 U.S. 1,23-24, to imply that a 4:1 ratio between compensatory and punitive damages may approach some sort of per se constitutional line. The court's concern was fueled by two points defendant neglects: the award was also "200 times the out-of-pocket expenses" incurred by the plaintiff and "much in excess of the fine that could be imposed for insurance fraud." *(Ibid.)* Moreover, in *TXO Production Corp. v.*

*Alliance Resources Corp.* (1993) 509 U.S. 443, the court sustained a punitive award of $10 million, *526 times* the $19,000 actual damages award. *(Id.* at p. 453). The "shock" of this disparity, observed the court, "dissipates when one considers the *potential* loss to [the plaintiff] ... had petitioner succeeded in its illicit scheme." *(Ii* at p. 462, italics added.) The court held that even if the potential losses were fixed as low as $1 million- resulting in a 10:1 ratio of punitive to potential damages the disparity would not" 'jar one's constitutional sensibilities.' "*(Id.* at p. 462, quoting *Has4p,.* 499 U.S. at p. 18.)

Defendant notes that the court in *BMW* considered, as a guideline to the soundness of the punitive award, *statutory* penalties for the misconduct at issue. The same is true, as we have observed, in *Pacific Mutual.* Seeking support in this approach here, defendant cites California statutes imposing penalties of no more than $6,000 for furnishing tobacco products to persons under 18. (Bus. & Prof. Code, § 22958 [civil penalty from $200 for first offense to $6,000

for fifth offense]; Pen. Code, § 308 [penal fine of $200 for first offense up to $1,000 for third offense].) Defendant also cites the 1969 Act, which allows penalties up to $10,000 for violating its provisions. (15 U.S.C. § 1337.) We think the argument under the state statutes backfires. Assuming plaintiff smoked for three years before reaching the age of 18, and assuming defendant (by its own analogy) furnished cigarettes to her every day of that time, its conduct would seemingly constitute nearly 1100 violations of the two California statutes cited. Assessing the maximum civil penalty of $6,000 would yield a total penalty of $6.6 million dollars. The penalty would be much higher if the statute were viewed as permitting each *cigarette* furnished to serve as the predicate for a distinct violation. Furthermore, defendant overlooks the exposure of every person in this state to civil penalties of $2,500 per violation for any act of "unfair competition" (Bus. & Prof. Code, § 17206), which includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" *(id.,* § 17200). This statute could seemingly be applied, by analogy to defendant's argument, to sales of cigarettes topl~~ not only when she was a minor but throughout her 35-year smoking history.

Moreover, as we have noted, the Supreme Court's interest in examining statutory penalties stems from concerns about *notice* as ft bears on the fundamental faimess, or unfairness, in imposing a specific award. Defendant has long known that ft was at risk for civil liability based upon its products, and we may readily infer that ft also knew ft was at risk for liability under traditional common-law concepts like fraud, which at the time of most of the relevant conduct would support virtually unlimited punitive damage awards. The trial court quoted from a 1980 internal document reporting that defendant's attorneys had been saying that" 'the entire matter of addiction is the most potent weapon a prosecuting *[sic]* attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as" free choice" if the person

was "addicted."' "Defendant obviously knew that the risks of pursuing its course were very high indeed. It nonetheless pursued that course. That ft can be compelled to disgorge a tiny fraction of the resulting profits as a punitive award does not offend our conscience, constitutional or otherwise. We detect no constitutional infirmity in the award.

Turning to state-law review for "passion or prejudice," we observe that in addition to the reprehensibility we have already discussed, defendant's vast financial resources, presumably built largely on the very conduct here at issue, justified a very large award. The trial court stated, and defendant does not contest, that defendant's net worth at the time of the award was over $3.4 billion. As the court noted, a $25 million award represents less than 3/4 of one percent of that sum. Defendant asserts that this factor does not answer a federal constitutional objection, but we do not cite it in that context. The award is of sufficient size to "sting," without posing any danger that it will "kill." (*Troensegaard v. Silvercrest Industries, Inc., supra,* 175 Cal.App.3d 218 at p. 227.)

Defendant contends that the award is excessive in light of the potential for other actions like this one in which punitive damages may also be awarded, magnifying the deterrent effect. Multiplicity of awards is a factor that may be weighed, and on proper presentation presumably should or must be weighed, in fixing a punitive damage award. "Punitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter." (*Stevens v. Owens-Corning Fiberglas Corp., supra, 49* Cal.App.4th at p. 1661.) "The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Ibid.*; accord, *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d *952, 969,* disapproved on other grounds in *Adams v. Murakami* (1991) *54* Cal.3d *105,* 115-116; see *Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 667; Rest.2d Torts, § 908,

com. *e; 6* Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1328, p. 786.)

In its careful evaluation of punitive damages here, the trial court expressly cited the possibility of future awards as one reason to reduce the jury's award from *$50* million to *$25* million. The court predicted that numerous suits would be filed against defendant, that the costs of defense and any resulting judgments would be substantial, that punitive damages "undoubtedly will be requested and may well be awarded in many such suits," and that this reinforced the court's conclusion "that $25 million is enough to punish and deter in the present context." Defendant's argument is that the award should have been reduced even further. We can find no fault in the trial court's reasoning on this point. The extent to which other plaintiffs may succeed remains to be seen. To predict the success rate of such future litigation would be purely speculative, and the trial court might have been justified in refusing to give that factor any weight whatsoever. As it stands, defendant has shown nothing more than "the mere possibility of a future award in a different case,"

which of itself "is not a ground for Ilfurther reducing] the award in this case.... If defendant] should be confronted with the possibility of an award in another case for the

same conduct, it may raise the issue in that case." ( *Grimshaw v. Ford Motor Co.* (1981)

119 Cal.App.3d *757*, 812; *Stevens v. Owens-Corning Fiberglas Corp., supra, 49*

Cal.App.4th at pp. 1661-1662; *Vossler v. Richards Manufacturing Co., supra,* 143

Cal.App.3d at pp. 968-969.)

Insofar as the award is challenged under California law, we cannot say that, as reduced by the trial court, it is the

product of passion and prejudice. Reviewing it de novo under federal constitutional principles, we cannot say that it was "grossly excessive."

The judgment is affirmed.

We concur:

Reardon, P.J.

Kay, J.

Sepulveda, J.

Trial Court: Trial Judge: Counsel for Appellant:

Counsel for Respondent: San Francisco County Superior Court

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REFERENCES:

1 All future references to former section *1714.45* are to the version in effect from January

1, 1988, to January 1, 1998.

2 We use the term "addicted" as shorthand without meaning to declare as a judicial fact that tobacco is addictive in any sertled medical sense. That question is not before us. The jury here presumptively found that tobacco was addictive in a sense supported by the evidence and supportive of the judgment.

3 The same or related issues are currently pending before the Supreme Court in at least five cases: *Myers v. Phi/lip Morris Companies, Inc.* (9th Cir. 2001) 239 F.3d 1029, certification accepted March 21, 2001 (S0952 13); *Souders v. Philip Morris Inc.* (2001) * Cal.App.4th * ~lO4 Cal.Rptr.2d 821], review granted, May 16, 2001 (S096570); *Naegele v. R. £Reynolds* (2000) * Cal.App.4th * [96 Cal.Rptr.2d 666], review granted, Oct. 18, 2000 (S090420); *Bowyer v. Philip Morris, Inc.* (Mar. 28, 2001) B145673 [nonpub. opn.], review

anted June 13, 2001 (S097441); *Reynolds v. Phi/i Morris, Inc.* (July 10, 2001) P31418≤0, [nonpub. opn.], review granted, October /6, 2001 (S099989). In addition, as this

opinion was being prepared for filing, the Fourth District published *In re Tobacco Cases II* (Oct. 25 200 F) Cal.App.4th

[2001 Cal.App. LBXIS 841, 2001 C.D.O.S. 9195]. The court tlkere coii&fuded that nothing in the statute "unmistakably express[ed] any legislative intent that the amended statute be applied retroactively." *(Id.* at p. __ [2001 Cal.App. LBXIS 841, *4748; 2001 C.D.O:S. at p. 9201].) Our study of the statutory language has led us to the contrary conclusion.

4 Defendant's claim of erroneous admission of evidence is not cognizable in the absence of an objection below on the ground now asserted. (Bvid. Code, § 3~3, subd (a).) Defendant's statement that the evidence was admitted "despite objection is somewhat disingenuous:

the cited objections had nothing to do with the issue now under discussion. Defendant's complaint that the trial court should have instructed the jury to disregard evidence of conduct supposedly immunized by the statute founders on the acknowledged fact that no such instruction was proffered or re quested. Nor does the cited authority *(Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 333-334) support defendant's claim that the court was required to give such an instruction on its own motion. Finally, in ruling on post-trial motions the trial court was entitled to consider objectionable evidence to which no objection was asserted. (3 Witkin, Cal. Evidence (4th e cL2O OQ) Presentation at Trial, § 393, p. 484; Cal. Law Rev. Coin. com., West's Ann. Bvid. Code, § 140.)

5 Defendant has burdened an already mammoth record with vast quantities of unpublished authority from other jurisdictions. Our own unpublished op inions are not authority and parties are forbidden to cite them as such. (Cal. Rules of Court, rule 977(a).) Nor does a written opinion by a California trial court possess precedential value. *(Santa Ana Hospital Medical Center v. Belshe~* (1997) 56 Cal.App. 4th 8719, 831; see *Neary v. Regents of University of ~J[1]alfornia* (1992) 3 Cal.4th 273, 282, quoting *Fenske v. Board of Administration* (1980) 103 CaI.App.3d 590, 596 ["

'[T]riaF courts make no binding precedents.' "].) The federal district courts are trial courts, and their opinions are subject to this same principle. (*Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th *15,* 20, fn. 8.) Indeed, on questions of state law *no* federal court opinion is binding on us even that of the United States Supreme Court. (*East Quincy Services Dist. v. General Accident Ins. Co.* (2001) 88 Cal.App.4th 239, 246.)

6 This analysis makes it unnecessary to address plaintiffs argument that because her claim "accrued" after the effective date of the 1998 amendments, application of those amendments here would not be retroactive.

7 As italicized in defendant's brief, the challenged instruction provided in part: "[B]ecause of federal law, *cind except only as stated below,* you may not base any findings of liability on a determination that (a) defendant Philip Morris, through its advertising or promotional practices, neutralized, minimized or undermined the effect of the federally -mandated warnings after July 1, 1969, or (b) defendant Philip Morris, after July 1, 1969, failed to disclose, or concealed or suppressed, information about the health risks of smoking. [∂1 *The federal law does not limit the potential liability of Philip Morris against claims* that it made misrepresentations about the health risks of smoking or *that it conspired with other cigarette companies to conceal A suppress, or misrepresent information regarding the health effects of smoking."*

8 We do not consider two related questions, not presented in *Soule,* concerning the applicability of its holding where (1) the ordinary user of a product may be predisposed by psychological and pharmacological factors associated with its use to perceive its risks di fferentl~ than do other members of the public, and (2) the "minimum safety" of the product is a matter of public controversy as to which consumers have been exposed to a variety of conflicting opinions, assertions and sophisticated propaganda techniques intended to neutralize any perception of

danger.

9 Comment *i* provides: "i. *Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the pro duct makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for a11 consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of full el oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

10 The documents cited by the trial court amply showed knowledge by defendant that its Marlboro cigarettes were particularly successful among children. Another document shows that this was no accident ~but the deliberate result of symbols consciously manipulating the adolescent mentality: "Marlboro's traditional area of strength has, of course been young people because the principal message its imagery delivers is independence, or young people who are always being told what to do, the Marlboro man says, 'I'm in charge of life. ¶_.... iə] [T]he maturity of the Marlboro man makes him representative of the idea

smoker self confident and secure."

11 *Cooper Industries* held that a federal appellate court had to address the excessiveness issue de novo where the district court had refused to set aside an award of punitive damages. The court indicated that an "abuse of discretion" standard would be consistent with due process if the award under scrutiny was made under, and in compliance with, a state law fixing a *statutory ceiling* for punitive damage awards. *(Cooper Industries, supra,* [121 S.Ct. at p. 1684, fn. 6], citing *BMW, supra* 51 'TU.S. at pp. 614-619 [app. to dis. opn. of Ginsburg J.].~ Later the court indicated that the novo review might not be ,required where state law 'tied the award of punitive damages more tightly to the jury s finding of compensatory damages." ( *Cooper Industries, supra,* [121 S.Ct. at p. 1687, fn. 13].) "This might be the case, for example, if the State's scheme constrained a jury to award only the exact amount of punitive damages it determined were necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages (e.g., treble damages)." *(Ibid.)* We assume for present purposes that California has no comparable statutory ceiling, and that de novo appellate review is therefore mandated under *Cooper Industries.*

No. 01-15387

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| MAHER W. SOLIMAN, | ) |
| | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| vs. | ) |
| | ) |
| PHILIP MORRIS INCORPORATED, et al. | ) |
| | ) |

Defendants-Appellees.

)

No. 01 -15387
DC - CV - 00-01530-MJJ
Northern California
(San Francisco)

APPEAL FROM THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA HONORABLE MARTIN J. JENKINS JUDGE NORTHERN DISTRICT OF CALIFORNIA NO. 00-1530-MJJ

PROOF OF FILING AND SERVICE BY MAIL

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FILED BY: MAHER W. SOLIMAN
APPELLANT IN PRO PER

State of California

County of San Francisco

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of San Francisco, over the age of eighteen (18) years and not a party to the within action or proceeding; that my address is 1112 Larkin Street, No. 405, San Francisco, California 94109; that on December 2nd, 2002, I served the attached documents entitled:

Appellant's Petition for Rehearing En Banc (FRAP 35)

By depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in First Class Mail, via the United States Postal Service as indicated.

Office of the Clerk (Original plus 50 copies)

U.S. Court of Appeals - Ninth Circuit
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I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of December, 2002, at San Francisco, California

MONICA VOGEL

Supreme Court, U.S.
FILED

(3)

02 1633 FEB 25 2003

OFFICE OF THE CLERK

NO. _____

IN THE

Supreme Court of the United States

---

MAHER W. SOLIMAN
Petitioner,

v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE
Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**APPENDIX - VOLUME II**

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FILED BY: MAHER W. SOLIMAN,JD
PETITIONER IN PROPRIA PERSONA
April 28th, 2003

394 PP

TITLE: STATE OF MINNESOTA AND BLUE CROSS AND BLUE SHIELD OF MINNESOTA, PLAINTIFFS, V. PHILIP MORRIS, INC., ET. AL., DEFENDANTS.
TOPIC: TRIAL TRANSCRIPT
TRANSCRIPT OF PROCEEDINGS
DOCKET-NUMBER: *C 1-94-8565*
VENUE: Minnesota District Court, Second Judicial District, Ramsey County.
YEAR: March 3, 1998
A.M. Session

JUDGE: Hon. Judge Kenneth J. Fitzpatrick, Chief Judge

TEXT:

THE CLERK: All rise. Ramsey County District Court is again in session, the Honorable Kenneth J. Fitzpatrick now presiding.

(Jury enters the courtroom.)

THE CLERK: Please be seated.
THE COURT: Good morning.
(Collective "Good morning.")
(Witness resumes the stand.)
THE COURT: Counsel.
MR. CIRESI: Thank you, Your Honor.
Good morning, ladies and gentlemen. (Collective "Good morning.")
GEOFFREY C. BIBLE called as a witness, being previously sworn, was
examined and testified as follows:
BY MR. CIRESI:
Q. Good morning, Mr. Bible.
A. Good morning, Mr. Ciresi.
Q. Sir, when we recessed yesterday, we were talking about Mr. Lincoln's
1958 memorandum to Mr. Millhiser, who was the vice

chairman of the company-- or who became the vice chairman of the company, regarding Mr. Lincoln's recommendation that benzpyrene must go. Do you remember that?
A. I recall it. Could I refer to the document again, please?
Q. Absolutely, sir. Exhibit 10686 in volume one.
A. (Coughing) Excuse me.
Yes, I have it.
Q. And you see down there at the bottom that Mr. Lincoln's analysis led to the conclusion that benzpyrene must go. Do you see that?
A. Yes, I see that.
Q. Now over the course of years, Philip Morris identified other carcinogens in its tobacco smoke, correct?
A. I don't know that. What I have been told -- I think I said yesterday that it has been identified that there are animal carcinogens in cigarette smoke.
Q. Can you direct your attention to Exhibit 10300. It's in the same volume, sir.
A. Yes, I have it.
Q. Now this is--
If you turn to the second page, you'll see that the title is "PHILIP MORRIS INCORPORATED, TOBACCO AND HEALTH-R&D APPROACH, Presentation to R&D Committee by Dr. H. Wakeham at meeting held in New York Office on November 15th, 1961." Do you see that?
A. Yes, I do.
MR. CIRESI: Okay. Your Honor, we'd offer Exhibit 10300.
MR. BLEAKLEY: No objection.
THE COURT: Court will receive Exhibit 10300. BY MR. CIRESI:
Q. Now sir, can you direct your attention to the first page. And you see the title there that we just read?
A. Yes.
Q. And if you go to the next page, there's a table of contents, correct?
A. Yes.
Q. It has various titles, "Chemistry of Tobacco Smoke, The Cancer Controversy, Smoking and Cardiovascular Diseases,

R&D Program Leading to a Medically Acceptable Cigarette," and then "Summary." Do you see that?
*2 A. Yes.
Q. Can you direct your attention to the next page. Now it's reported there, sir, that in 1961 Philip Morris had identified 400 compounds of which 50 had been identified for the first time by the Philip Morris Research Center.
A. Yes, that's what it says.
Q. Do you know if at that time Philip Morris made any disclosure of that information to the public?
A. No, I have no idea, sir.
Q. Has anybody ever told you that they did?
A. No, nobody has.
Q. Have you seen any documents which would indicate that they did?
A. No, I have not, sir.
Q. Sir, can you direct your attention to the next page. And is there listed there composition of mainstream smoke in both the gas phase and particulate phase?
A. Yes, I can see that.
Q. Do you have any understanding of gas -- or cigarette smoke, that it is composed of both a gas phase and a particulate phase?
A. Well somewhat, but not in depth. I'm not a scientist. But I have a vague understanding of it.
Q. And you see under the "GAS PHASE" that there are various chemical compounds listed?
A. Yes, I do.
Q. And do you know if those chemical compounds are carcinogenic?
A. Do I know that?
Q. Yes.
A. No, I don't.
Q. Can you direct your attention to the page which has the number 430.
A. Yes.
Q. And here definitions are provided, correct?
A. Yes, that's right.
Q. And carcinoma is defined as a malignant growth arising

from the epithelial tissue, correct?
A. That's what it says, sir, yes.
Q. And you're aware that the lung has an epithelial lining, correct?
A. Well I'm not aware of that, but I certainly am aware that the lung has tissue.
Q. And you see where sarcoma is defined as a malignant growth arising from connective or muscle tissues?
A. Yes, I can see that.
Q. And then a carcinogen is defined as a substance, when applied to the tissue of a test animal, gives rise to tumor formation in tests for carcinogens. It is assumed that tumors ultimately lead to cancerous growths and that a carcinogen so demonstrated in test animals is dangerous to man. Do you see that?
A. Yes, I read that.
Q. Now this would be an animal test, correct?
A. Yes, that's what it says.
Q. And it would be an animal test on the tissue of the animal, correct?
A. Yes. It doesn't say exterior or internal though.
Q. But it would be on the tissues, since that's what's described in the definition, sir?
A. Yes, I agree.
Q. Did Philip Morris in 1963 make any disclosure to the public that a carcinogen demonstrated in animal tests is dangerous to man?
A. I have no idea, sir.
Q. Has anybody ever told you if they did?
A. No, nobody has.
Q. Have you seen any documents that would indicate that they did?
A. No, I have not seen any document. I have not gone back.
Q. Now can you direct your attention to page 434 of the same document.
A. Yes.
Q. And is there listed here a partial list of compounds in cigarette smoke identified as carcinogens?
A. Yes. That's the title.

Q. And some of those are arsenic, correct?
A. Yes.
Q. Benzopyrene?
A. Yes.
Q. Chromium?
A. Yes.
Q. Cobalt?
A. Yes.
Q. Xylene?
A. Yes, I see that.
Q. Ethyl alcohol?
A. Yes.
Q. Are you familiar with any of these chemical compounds, sir?
A. I'm not familiar with any of them. I've heard the names naturally. I think some of them probably arise in the tobacco plant itself, sir.
Q. Did Philip Morris in 1963, or for that matter at any time, disclose to the public that it had identified as early as 1963 this list of
carcinogens in the tobacco smoke of its cigarettes?
A. Well it might have, but I don't know.
Q. You've never seen any such document that would reflect that, have you, sir?
A. No, I have not.
Q. You've never seen any newspaper advertisement about that, correct?
A. No, I have not, sir.
Q. Now can you direct your attention to page 442.
A. Yes.
Q. "REDUCTION OF CARCINOGENS IN SMOKE." Do you see the title, sir?
A. Yes, I do.
Q. Now did Philip Morris at any point in time advise the consuming public that carcinogens are found in practically every class of compound II smoke?
A. I don't know.
Q. Did Philip Morris ever advise the public that the fact that carcinogens were found in practically every class of

compounds in smoke would prohibit the complete solution of the problem by eliminating one or two classes of compounds?
A. Could you repeat that question, please?
Q. Sure.
Did Philip Morris ever advise the public that the fact that carcinogens were found in practically every class of compound in smoke would prohibit complete solution of the problem by eliminating one or two classes of compounds?
A. Not to my knowledge, sir.
Q. Did Philip Morris ever advise the public that the best the public could hope for was for Philip Morris to reduce a particularly bad class,
for example, polynuclear hydrocarbons?
A. Not to my knowledge, sir.
Q. Do you know what a polynuclear hydrocarbon is?
A. No, I don't.
Q. Do you know if benzene is included in polynuclear hydrocarbons?
A. Is it?
Q. Do you know if it is?
A. Do I? No, I don't, sir.
Q. Did Philip Morris ever advise the public that technology did not permit the selective filtration of particulate smoke?
A. I don't know, sir. I know we did quite a lot of work on filtration to try to eliminate tar and nicotine, or reduce it, but I don't know if we ever said anything along those lines.
Q. Did Philip Morris ever advise the public that flavor substances and carcinogenic substances come from the same classes in many instances?
A. Not to my knowledge, sir.
Q. And flavorants in large degree are added to cigarette tobacco, are they not?
A. We use flavorants in our cigarettes, yes, that's right. They are lodged -- I believe all of our ingredients are lodged with the Department
of Health and Human Services each year.
*4 Q. Do you know if the flavorants include carcinogenic compounds?

A. No, I don't know, sir.
Q. Do you know if the paper in cigarettes includes carcinogenic compounds?
A. No, I don't know, sir. I wouldn't have thought so, but I don't know.
Q. And the last point here is that many pyrolysis products have multiple precursors in tobacco, correct?
A. That's what it says, yes.
Q. And the precursor was a precursor for cancer, correct, sir?
A. Well I don't know. It doesn't say that.
Q. Do you know that -- what pyrolysis is?
A. Not really.
Q. You don't.
A.No.
Q. Never heard of that term?
A. I've heard the term, yes.
Q. What have you heard it referring to?
A. Well I've heard people in our research and development department talk about pyrolysis. I don't want to guess at it.
Q. I don't want you to guess, sir.
Now can you turn to page 443, and do you see here that it says "THE
PRODUCTION OF POLYCYCLIC HYDROCARBONS FROM TOBACCO VERSUS CIGARETTE PAPER?"
A. Yes, that's the heading.
Q. And polycyclic hydrocarbons were one of the most highly carcinogenic, correct?
A. Well I don't recall that. Could you refer me back to that, please?
Q. I will in one minute, sir. Can you go back to page 442, just the previous page.
A. Uh-huh. Yes, I have that.
Q. You see it there then, polynuclear hydrocarbons? Do you see those?
A. Polynuclear hydrocarbons, yes.
Q. Okay.
A. And what was your question?
Q.And-
A. Poly --

Q. -- you see here that this is the production of polycyclic hydrocarbons from tobacco versus cigarette paper, and I was asking you whether or not polycyclic are not one of the most highly carcinogenic. Or let me put it another way. A particularly bad class.
A. Well I don't know. In fact polycyclic is what this says, and polynuclear I think is what this says, and I don't know the difference.
Q. You don't know if they're the same or different.
A. No, I don't.
Q. All right. Well if we assume that they're the same, they would be one of the particularly bad classes, correct?
A. Well it's not --
MR. BLEAKLEY: Excuse me. Objection, Your Honor, calls for speculation.
THE COURT: No, I think it's referring to the document. You may answer.
Q. I'm just asking you to assume they're the same, and if they are, they would be a particularly bad class, correct?
A. Well I'm a little confused again -- and I'm not trying to be difficult, please believe me -- but one says polynuclear hydrocarbons, the other says polycyclic hydrocarbons. This in the paper here says that polynuclear hydrocarbons appear to be carcinogenic. I don't know about polycyclic hydrocarbons. That's all I can say.
Q.I understand. And I'm not trying to be difficult either.
A. All right.
Q. I just ask you to assume that the two are the same. If they-
A. Well I don't -- I don't know that I can, but the terms are different.
Q. Well I understand that, Mr. Bible, but I have a right to ask you to assume that. All right?
A. I don't know.
Q. Because there are other people that will testify in this case. You understand that. You understand, sir?
A. No, I don't -- I-I don't -- didn't understand that you had the right to ask me those things, but if you do, I shall accept that.
Q. All right. If you assume that to be true, then that is the

particularly bad class, right?
A. Well I don't know I can form that conclusion.
Q. Fair enough. You -- you just can't form that conclusion, is that right?
A. That's right.
Q. Now here we see that polycyclic hydrocarbons are found in both cigarette paper and the tobacco, correct?
A. Yes, that's my --
I think that's what this says.
Q. You didn't know that until you saw this, correct?
A. No, I didn't know that, no.
Q. And you see down there the conclusion is that tobacco is the main source of polynuclear hydrocarbons in cigarette smoke, correct?
A. Yes, I read that. Uh-huh.
Q. And if you go on to the next page, sir, you can see that polycyclic hydrocarbons come from many tobacco constituents, correct?
A. Yes. That's the heading.
Q. And you see the conclusion there, "Removal of any single precursor will not eliminate polycyclic hydrocarbons from smoke." Do you see that?
A. Yes, I read that conclusion.
Q. Yes. Do you know if this information was ever disclosed by Philip Morris to the public?
A. No, I don't know, sir.
Q. Has anybody ever told you whether Philip Morris disclosed this type of information to the public?
A. No.
This is back in 1961, is it?
Q. 63, sir.
A. 63. No, I don't have any recollection of anybody telling me that.
Q. And if you go to the last page, you see there's a summary, sir?
A. Could you give me the number, please?
Q. Yes, absolutely. I'm sorry, it was not the last. 446.
A. Thank you, yes.
Q. Second-to-the-last page.

A. Yes. Thanks.
Q. Do you see the summary?
A. Yes, I do.
Q. And it says "A medically acceptable" --
And that's underscored, is that right?
A. Yes, it is.
Q. -- "low-carcinogen cigarette may be possible. Its development would require time, money," and "unfaltering determination." Correct?
A. Yes, that's what it says.
Q. Now did Philip Morris ever tell the public that it was looking at a medically acceptable low-carcinogen cigarette which may be possible to be
developed?
A. I don't know if--
Are you talking about that time, then, sir, or --
Q. Yes.
A. At that time? Then I don't know, at that time.
Q. Do you know if they ever said they were attempting to develop a medically acceptable low-carcinogen cigarette?
A. I don't know that they've said exactly that. I know over the last year we have developed a product that has, I believe, made a lot of progress in reducing very significantly many of the elements in tobacco smoke that people are concerned about.
Q.Is that Project TABLE?
A. No, it's not Project TABLE. This is a -- it's a cigarette that in fact would --
*6 The tobacco is heated as opposed to burned. And currently it is in consumer home test. And we've spent years trying to develop this product. And at last we have a product we can put into consumer home test, and we're very hopeful about it.
Q. And did that start as Project TABLE?
A. Not to my knowledge, sir.
Q. Have you ever heard the word "Project TABLE?"
A. No, I have not.
Q. All right. Now this was back in 1963, 1963, that Dr. Wakeham said a medically acceptable low-carcinogen

cigarette may be possible, but its development would require time, money and unfaltering determination. correct?
A. Yes, that's what it says.
Q. Do you know if a decision was made not to develop that because it might indict the present cigarettes that were on the market?
A. Oh, I have no idea. What I do know is that we certainly spent a lot of effort in reducing tar and nicotine and doing our very best to make the best product we can. In fact I believe tar and nicotine levels in cigarettes over the last 40 or 50 years have come down by about half, so we ye certainly worked hard at it.
Q. We've heard about that, sir. Are you aware of the issue of compensation?
A. Yes, I am.
Q. Are you aware of when Philip Morris knew about compensation?
A. No, I am not.
Q. Have you ever looked -- I -- strike that.
I take it you've never looked at any documents regarding that either.
A. No, I have not.
Q. So you don't know when Philip Morris knew that people were compensating with low tar and nicotine cigarettes, do you?
A. No, I don't know. I've asked my scientist about the issue of compensation.
Q. Now back in 1963 -- I'm going to ask the question again - - do you know if Philip Morris at that time undertook a project to develop a medically acceptable low-carcinogen cigarette?
A. No, I don't know.
Q. Do you know what a medically acceptable low-carcinogen cigarette would be?
A. Would I know what it would be?
Q. Yes.
A. It would be pretty hard for me to describe, sir. No, I wouldn't know what it would be.
Q. How many carcinogens would be in a medically

acceptable low-carcinogen cigarette?
A. I don't know.
Q. Have you ever asked anybody that?
A. No, I have not.
Q. Can you direct your attention, sir, to Exhibit 11604. Now this is a memorandum to Mr. Culiman from Dr. Wakeham, correct?
A. Yes, it is.
Q. And this is October 24th, 1963, correct?
A. Yes.
Q. Have you seen this document before?
A. No, I have not seen this document.
Q. Now was Mr. Cullman --
What was his position in the company, Hugh Culiman?
A. I don't know what his position was then.
Q. Do you know if he was ever president of the company?
A. I don't think he ever was. When I joined the company he was president of Philip Morris International.
Q. And did you ever hold the position of Philip Morris International president?
A. Did I?
Q. Yes.
A. Yes.
Q. Now this is a technical forecast, correct?
*7A. Well I....
Yes. That's what the subject is, yes, you're right.
Q. And you see up in the upper left-hand corner it's personal and confidential?
A. Yes.
Q. And Dr. Wakeham here is reporting to Mr. Cullman pursuant to Mr. Culiman's request for a technical forecast outlining the areas where the cigarette industry might be most subject to criticism, correct?
A. Well that's the beginning of the letter, yes.
Q. And he wanted to -- suggestions as to how those elements in smoke which might be most accused by either the medical profession or exploited
by our competitors, is that right?
A. Do you mind if I just read it?

Q. Sure. Go right ahead, sir.
A. Yes.
Q. And in this memorandum, Dr. Wakeham is providing Mr. Culiman with the considered judgment of the research and development department, correct?
A. Well I'll read the --
MR. BLEAKLEY: Objection. Objection, Your Honor, the witness has just seen this document. If he's going to ask him to summarize it, at the very least the witness should be allowed to read the entire document.
THE COURT: Was this document identified?
MR. CIRESI: Yes, Your Honor.
TUE COURT: All right. Do you -- do you --
Would you like to read the entire document?
THE WITNESS: Well if I'm going to be asked questions about it, Your Honor, I'd like to.
THE COURT: Okay. Well that's why we give notice to the witnesses. We'll sit and wait while you read the entire document.
THE WITNESS: Well thank you.
MR. CIRESI: Might I suggest, Your Honor, if I may - -
BY MR. CIRESI:
Q. Mr. Bible, just to save time, as we go through it, if you need to take a look at another part of it, please tell me.
A. All right.
Q. Because I want you to have an opportunity to look at all of it --
A. Thank you.
Q. If that's what you need to do, but I'm going to try to go through it bit by bit so we'll put it in context. All right?
A. Thank you.
Q. I'm just dealing with the first paragraph there. And does Dr. Wakeham say he will present here our considered judgment in this matter?
A. Yes.
Q. Now Dr. Wakeham was the head of research and development at Philip Morris, correct?
A. I believe so, but I don't know at what time he was.
Q. All right. Now Dr. Wakeham here refers to the health

critics, correct?
A. Yes.
Q. And there are three main lines of attack, correct?
A. Yes.
Q. Okay. Now do you believe it appropriate for Philip Morris at any point in time to consider public health officials to be health critics?
A. No, I don't. I don't know if that's who he's referring to, but --That probably is who he is referring to, and I don't think that's appropriate. But I don't think he meant it in a mean fashion.
Q. No more than you meant it in a mean fashion in your 1994 report when you talked about how you were going to defend the company and what you were going to do with regard to defending the company, right? You didn't mean that in a mean fashion.
*8 A. Of course I didn't, sir.
Q. No. And you know what I'm referring to.
A. You're referring to my letter to shareholders in the annual report.
Q. Yes.
A. Yes.
Q. You didn't mean that in a mean fashion, did you?
A. No, I don't believe I did mean it in a mean fashion.
Q. When you were talking about the FDA, you didn't mean that in a mean fashion, did you?
A. No.
Q. When you said you were going on the offensive to vindicate your rights and to make it clear that the current notions of political correctness cannot be used to justify unlawful conduct that abridges those rights, you didn't mean that in a mean fashion, did you?
A. No, I didn't think I was being mean. I was being objective.
Q. And when you said that in the legal area we are committing all the resources necessary to defend the company from new forms of litigation, making sure we have better firepower than our foes no matter how formidable, you didn't mean that in a mean fashion?
A. No, I certainly meant it in the most objective fashion I

could muster, yes.
Q. Yes. And you meant it on a going-forward basis, didn't you? You were looking forward, as you said yesterday, weren't you? You weren't talking about the past.
A. Sir, I'm looking forward all the time now, as I expressed yesterday. Q. And when you made that comment yesterday, Mr. Bible -- or in this letter in 1995, February 24th, you were looking forward, weren't you?
A. Yes, I expressed that yesterday, and I still am, and I'm working very hard to resolve the issues around this industry and company.
Q. And you said we're going to have better firepower than our foes, no matter how formidable, correct, sir?
A. Absolutely.
Q. And you said in the new class action suits and state Medicaid, we believe the law continues to be on our side. Although these cases pose difficult challenges, we should ultimately prevail in them, just as we have been successful in other types of cases over the last 40 years. Correct?
A. Yes.
Q. And you were talking about going forward, weren't you, sir?
A. Yes, I was.
Q. You were looking forward at that time, weren't you, sir?
A. Yes, I was.
Q. And-
A. And I—and I still am.
Q. And you said it's important to note here that the tobacco company has never lost or paid to settle a case, correct?
A. Well I don't have it in front of me, but that sounds familiar. Q. And when you said that, you were talking about going forward, weren't you?
A. Well certainly. Couldn't be going backwards, sir.
Q. And you were -- I agree with you. And you were going to fight those cases with all the resources that you could bring to bear, isn't that right, sir?
A. Yes.
Q. And in fact, you called a bunch of analysts in and you said we shall fight and fight and fight these issues, didn't

you?
A. I don't recall calling a bunch of analysts in.
Q. You remember the time you had a meeting in the Grand Hyatt bathroom in New York?
*9 A. Yes, I do.
Q. And you had the Magnificent Seven on a 12-foot screen, do you remember that?
A. No, I don't remember that.
But let me correct what you described it as. That was an invitation to Philip Morris to attend an investment analysts' seminar where many companies presented their companies to investment analysts.
Q. And you--
A. So I --
Q. And you presented yours.
MR. BLEAKLEY: Objection, Your Honor, the witness was in the middle of his answer.
THE COURT: Allow him to finish his answer, please.
MR. CIRESI: I'm sorry, didn't --
A. And we were one of many companies and we presented our company to those analysts at that time.
Q. And when you presented your company, you said you were going to fight, fight and fight these issues, correct?
A. Well I don't know if I said that or not, sir, but it sounds familiar.
Q. Yes. And there was a 12-foot screen and you put up the Magnificent Seven commercial and blasted it out over the whole audience, didn't you?
A. I don't recall that, sir.
Q. Have no recollection of that, sir?
A. No, I don't.
Q. You don't deny that took place, do you?
A. I -- I don't recall it, sir.
MR. BLEAKLEY: Objection, Your Honor, the witness doesn't recall it. Whether he denies it is not relevant.
THE COURT: No, it's relevant.
Q. Do you deny it, sir?
A. No, I neither affirm nor deny it. I don't remember.
Q. Okay. Do you remember there was an article about it in

the Wall Street Journal?
A. No. There are many newspaper articles in the Wall Street Journal.
Q. I'll grant you that, sir.
MR. CIRESI: May I approach, Your Honor? (Document to witness.)
BY MR. CII{ESI:
Q. I just want to refresh your recollection of this, sir, I'm not asking to enter it into evidence. It's a Wall Street Journal -- copy of the Wall Street Journal article dated March 30th, 1995. Do you see that?
A. Yes, I do.
Q. And it relates to this meeting that took place in October of 1995 --or excuse me, in February of 1995?
A. Well it's dated Monday, October 30, 1995. I don't see February.
Q. Wasn't it at the end of February you had this meeting?
A. Oh, I have no idea.
Q. Well let me see if I can refresh your recollection. Do you recall after the meeting that the stock value of the company went up two billion dollars and it was called the two-billion-dollar day?
A. No, I don't remember that either.
Q. Maybe --
A. It's certainly possible, but I don't remember it.
Q. Why don't you take a look at the second page, and if you look at the left-hand column, sir, third paragraph from the bottom, do you see that you're quoted there, "We shall fight, fight and fight these issues?"
A. Well yes, I -- I recall that. Yes, I see that.
Q. And this was at the Grand Hyatt ballroom?
A. That's what it says, yes.
Q. And it said, "I can assure you we will fight with all the resources at our command because I am convinced we are right?"
*10 A. Yes, it says that.
Q. And one of the things you personally think you're right about is that smoking doesn't cause any disease, is that correct?

A. No, I have said that I think cigarette smoking is a significant risk factor in many diseases.
Q. Does that mean it causes disease? You just said "no" to my answer.
A. I've said that it is a risk factor and a significant risk factor
Q. Does that mean --
A.-- in many diseases.
Q. -- it causes disease?
A. I don't know, sir.
Q. Well was one of the things you personally think you're right about is that smoking doesn't cause any disease?
A. I don't know. I've said that publicly.
Q. So you didn't know if you were right about that or not, is that right?
A. I'm not sure what you're referring to. Could you --
Q. Whether smoking causes disease.
A. Are you asking me that question?
Q. Yes. You don't know if you're right or not, is that right?
A. I don't know if I'm right. It might cause disease. I don't know.
Q. All right. Now at this analysts meeting, do you see there where the playing of the Magnificent Seven is referenced?
A. Yes, I do see that.
Q. Does that refresh your recollection, sir?
A. Well it doesn't. But I don't deny that's what it says, and I -- I expect we did show it.
Q. And in fact didn't you have some part in the planning of that? You wanted to make a big show with the analysts, didn't you?
A. I'm quite involved in those sorts of presentations, yes, I am, and I'm very proud of our company and I like to put forward the best foot that we can, and I make sure that the operating companies present themselves as best they can when we make presentations to analysts. Yes, you're right.
Q. You actually put your management team through the paces and graded them, didn't you?
A. I don't recall that.
Q. Well, can you look to the paragraph right above that. "Executives who didn't pump up the volume got a drubbing

from the new boss." That's you, isn't it?
A. Well I was the new boss, but they certainly didn't getting a drubbing from the new boss, I can promise you that.
Q. Well in February of 1995, did you assemble your top executives in New York for a run-through of their presentation of Philip Morris's aggressive new face to the Wall Street and the media?
A. Well I -- I -- I don't remember, but it's highly likely I would have because I take a big interest in those. And I don't know that I would have been defining it as Philip Morris's aggressive new face. I --
Q. Well you know that you'd been defined as the aggressive new face back in 1994, weren't you?
A. I don't know that.
Q. You never read that?
A. Well I may have, but I don't remember it if I was. I'm often called many things.
Q. I understand, sir.
Let me ask you this: Having in mind now that you are that involved and that you get involved with your executives, does this refresh your recollection that you had them in for a run-through of their presentation?
* 11 A. Well I don't remember that, but it's highly likely that I did.
I'm not denying that I did, sir.
Q. And it's reported that you graded the executives after each one spoke and you let loose some withering criticism and graded all of them in front of everybody else. Is that what you did?
A. I would say that's absolutely wrong.
Q. You didn't do that, is that right?
A. I would never do that.
Q. You wouldn't.
A. No.
Q. Did you have your publicist of this 68-billion-dollar company call the Wall Street Journal or write to them and say that's flat-out false, I
never did that?
A. No, I didn't. I could spend the rest of my life, I think, if I

wanted to try to correct everything that was said in the newspapers about me and the company.
Q. And Murray Bring was the company's top legal strategist, was he not?
A. Murray Bring would have been the chief general counsel of the company.
Q. And he's quoted here, isn't he?
A. Could you direct me to that, please?
Q. Same paragraph.
A. Uh-huh.
Q. And it's-- And he said, "The message was we could do a hell of a lot better." Correct?
A. That's what it says.
Q. And is that the message you gave all those executives after you graded them?
A. Well I might well have said you could do better. I could believe I would say that.
Q. You can't believe, though, that you would have said we can do a hell of a lot better, is that right?
A. Well I'm -- I may have. I doubt it though, I -- just as I doubt I would have let loose withering criticism. That's not my style.
Q. But you don't deny that the words in the 1994 annual report about going on the offensive and defending your company are your words, do you,
sir?
A. Well could you direct me to that again, please, sir?
Q. Absolutely. Exhibit 17624.
MR. BLEAKLEY: May we have a page number, please?
A. Yes, I have it. That's the 19 -- hmm.
THE COURT: Counsel, can you give him the page number, please.
MR. CIRESI: 1994 annual report.
THE WITNESS: Yes, right.
MR. CIRESI: And it's the -- I don't have actual pages -- Well it's page four, lower left-hand corner.
Q. It's the one we've been looking at, sir, your -- your letter to the shareholders.
A. Oh, right. Thank you. Got it. So could you direct

me to the --
Q. Certainly. "Defending our Company."
A. Uh-huh.
Q. Right at the bottom where "We are going on the offensive to vindicate our rights." Do you see that?
A. Yes.
Q. Okay. And this is the letter that you wrote to the shareholders on February 24th, 1995.
A. That's correct, yes.
Q. There's no dispute about that, is there, sir?
A. No, I'm not disputing that. I just wanted to see that's indeed what it said.
Q. And did you write the letter or was it written for you?
A. It would have been a combination of people who help draft these letters and myself
Q. Does that mean that somebody wrote it for you and then you edited it?
* 12 A. No, it would have been both. We would have participated together, probably.
Q. And these are your words and you adopt them as such, don't you?
A. These are my words I would have thought, yes.
Q. And they were intended to be the words on behalf of the corporation, correct, sir?
A. Yes, that is right, to -- to the stockholders.
Q. And in this letter, this is the one where you said that our one all-consuming ambition was to create wealth for the owners, correct?
A. Well I --
Could you point me to that, please, sir?
Q. Certainly.
A. I don't doubt saying that.
Q. Page two. Just go back two pages. "Growing our Business." Right at the very top.
A. Uh-huh.
Q. "Our one all-consuming ambition --
A. Right. Yes, I remember that yesterday.
Q. Okay. Now --
And this is in 1995 when you were saying that, isn't that

right?
A. Yes.
Q. Okay. Right after you took over, about six -- six or seven months after.
A. Well six months after I took over as CEO and a month after I became chairman, yes.
Q. And so now if we can't just go back 34 years -- or excuse me, 32 years, back to document 11604 --
And Mr. Bible, before you do that, let -- let me ask you this: You understand that the purpose of this lawsuit is to look at Philip Morris's conduct over a long period of time. Do you understand that?
MR. BLEAKLEY: Objection, Your Honor, that's an inappropriate - - improper question. The purpose of this lawsuit is not a proper question to ask this witness.
THE COURT: Sustained
Q. Do you know if in this lawsuit we're looking at Philip Morris's conduct over a long period of time?
A. Well I got that impression from yesterday's interrogation.
Q. And in order to look at its conduct over that period of time, we must look at what they knew, when they knew it, and what they did with that information. You would agree with that?
A. Well --
MR. BLEAKLEY: Objection, Your Honor, whether they must or not is also a legal question and not within the competence of this witness.
THE COURT: No, I think you can answer that.
A. Well I would describe that as being your prerogative, if that's how you feel it should be done, certainly.
Q. Well you would feel that if someone was going to look at someone's conduct over a period of time, they would look at what they knew, when they knew it, and what they did with the information.
A. Well that doesn't seem unreasonable to me, no.
Q. Okay. Seems like a reasonable way to approach it, doesn't it?
A. Well it's one way to approach it, yes. Not unreasonable, as I said.

Q. Now let's look back 32 years, before your words in the annual report and what you said at that analysts' meeting, to see what was being said by
Philip Morris then. All right?
A. Uh-huh.
Q. Can you take a look, then, back to Exhibit 11604, the memo from Dr. Wakeham to Mi-. Hugh Cullman.
Now in 1994 and 1995, one of the objects of your attack or offensive was the FDA, correct?
13 A. In nineteen ninety –
Q.Five.
A. -- five? When I say -- you say "attack," I would define it differently. We were defending ourselves against a number of matters at that time. The FDA had proposed regulation. I think there had been a lot of television coverage where we'd been maligned by a television article. I believe there were congressional hearings at the time. So there was -- and there were mounting legal actions against the company. So there were many things that were developing around the company. That's why I was consumed by all this activity and wanted to find some solution going forward. So my sense, if I were asked to define it, would be how can I defend the company as best as I can and find a solution to these growing issues.
Q. Sir, my question was pretty simple: One of the objects of your offensive was the FDA, correct?
A. Which offensive, sir?
Q. The offensive to defend your company.
A. Well I would say it was the defense of my company, and I wouldn't describe it as an offensive, sir.
Q. I thought you said, "We are going on the offensive to vindicate our rights." Those are your words, not mine.
A. Well if they were my words, the idea there was that we were going to go on the offensive to defend the company, sir.
Q. All right. Well I'll do it that way.
One of the objects of your offensive to defend the company was the FDA, correct?
A. Yes, that's correct. We did not believe the FDA had

jurisdiction over the tobacco industry. That's Congress's right.
Q. And you felt that because you didn't want them to regulate nicotine.
A. No, I don't think that would be a fair characterization of it.
Q. Well we'll get to that a little bit later and take a look at those documents.
Directing your attention to Exhibit 11604, here Dr. Wakeham's talking
about the health critics who may follow three main lines of attack, right?
A. Yes.
Q. "Chemical carcinogenesis of the lungs by smoke constituents," correct?
A. Yes.
Q. Now we know that Philip Morris as of this date had already identified smoke constituents that were carcinogenic, correct?
A. Well yes, that's -- I think so.
Q. And the second attack was "Irritation from smoke components leading to chronic bronchitis and emphysema," correct?
A. Yes, that's what it says.
Q. And then the third was "Cardiovascular effects due mainly to nicotine in the smoke." Correct?
A. Yes, that's what it says.
Q. Now I understand you have not had the opportunity to read this entire document yet, but if you take a look at it -- and please take lime to look at it -- would you agree with me that in the next part of the memorandum under number one, Dr. Wakeham reports about the fact that rather than there being a super carcinogenic substance, the experts were now looking to the carcinogen issue in which there were several types of minor carcinogenic compounds in smoke that reinforce one another?
A. Well I didn't get that, but if I'm --
* 14. I think you jumped around a bit.
Q. Well just please -- please read the next two paragraphs - -

and they're right up there, anybody can read them -- and see if that isn't a fair summary of what he reports there.
MR. BLEAKLEY: Objection to Mr. Ciresi's commentary on the document, Your Honor.
TUE COURT: Just ask a question, please.
Q. Please take a look at those two paragraphs and see if that isn't a fair summary of those two paragraphs.
A. Well if I read it, I shall then ask you if you could give your summary again, please.
Q. Iwill.
A. Thank you.
I find it very difficult to summarize. I'd like to hear yours.
Q. My summary was that rather than there being one super carcinogen, people were now looking to cocarcinogens which, combined together, were sufficient to account for cancer.
A. Well I think what it says is, as I read this, although no one compound is present in sufficient quantities to account for the effect, the combined activity of all is enough to do the trick, and I don't see reference to a super carcinogen.
Q. All right. Well that's what I meant by one carcinogen itself And in fact, Dr. Wakeham at -- in this document, the next page, reports that the -- what he refers to as the medical attack on cigarettes will be based on the carcinogen idea, and that with hundreds of carbon -- hundreds of compounds in smoke, this hypothesis will be hard to contest. Do you see that?
A. Yes, that's what it says.
Q. And by the notion that the hundreds of compounds in smoke that may be carcinogenic, that's consistent with the previous documents we saw of Philip Morris which identified many carcinogens in smoke, correct?
A. Could you repeat the question? You mentioned hundreds of-
Q. It's talking about hundreds of compounds. That's consistent with the previous documents of Philip Morris that we just reviewed this morning - -
A. Yes.
Q. -- that showed carcinogens in smoke, right?

A. Yes, that's right.
Q. And Philip Morris had knowledge of that for a number of years prior to 1963, correct?
A. That there were carcinogens in smoke?
Q. Yes. And many carcinogens and hundreds of compounds, correct?
A. Prior -- prior to when, sir?
Q. Prior to October 24th, 1963.
A. Well I don't know. What was the date of the letter we looked at earlier?
Q. Well we saw one in 1961, for example. That's two years before, correct?
A. The one you just referred to, I'm sorry.
Q. 1961, sir.
A. Thank you.
Q. Two years before, correct?
A. Yes.
Q. Is that--
A. Two years before, yes.
Q. All right. Now Dr. Wakeham then goes on to talk about the polynuclear hydrocarbons. Do you recall seeing those in that previous memo?
A. Yes, I do.
Q. And he talks about nitrosamines. Do you see that?
A. Yes.
Q. And you know nitrosamines are highly carcinogenic, don't you?
A. I don't know if they're highly carcinogenic. I've heard that they are carcinogenic. I believe there is some debate over it, but I believe they're carcinogenic from what I hear in many --
*15 Q. And Dr. Wakeham reports here that the lower nilrosamines are highly carcinogenic in the bioassay tests, correct?
A. I can't find that.
Q. Right under "Nitrosamines," the very last sentence.
A. The very last sentence says, "It is apparent that interest in nitrosamines is increasing." Is that the one you're referring to?

Q. I'm starting the first paragraph. Do you see it there, sir?
A. "The lower nitrosamines are highly carcinogenic in the bioassay tests," is that what you cite?
Q. Yes.
A. Yes.
Q. And Dr. Wakeham reports that these substances have been under investigation since early in the year, and that indications of their presence, particularly the higher members, have been found, correct?
A. We have found indications, yes, it says that.
Q. And he says the lower members have not been found, but the elements for their formation are present in smoke, correct?
A. That's what it says, yes.
Q. Then he goes on to talk about carbamates or urethanes, which are highly carcinogenic, particularly to lung tissue, correct?
A. That's what it says, yes.
Q. And do you know if that was one of the compounds that we saw in the earlier memo in 1961?
A. Do I remember? I don't remember that, no.
Q. And he talks about terpenes, correct?
A. Talks about which, sir?
Q. Yes. Terpenes, t-e-r-p-e-n-e-s. Do you see that?
A. Oh, yes. The next paragraph.
Q. Yes.
A. Thank you.
Q. And he references there that some members of that family are present in smoke, correct?
A. Yes, he does.
Q. And if you go on to the next page, sir, he deals with bronchitis and emphysema, correct?
A. (Coughing) Excuse me.
Yes.
Q. And he talks about the fact that these are serious diseases involving millions of people, correct?
A. Yes. That is said, yes.
Q. And that emphysema is often fatal either directly or through other respiratory complications, correct, sir?

A. It says that, yes.
Q. And he stated that a number of experts have predicted that the cigarette industry ultimately may be in greater trouble in this area than
the lung cancer field, correct?
A. That -- that's what it says, yes.
Q. And do you know how many cases of chronic obstructive pulmonary disease, including bronchitis and emphysema, have been reported extensively in the medical literature to be caused by cigarette smoking?
A. No, I don't.
Q. And he talks also about other types of compounds that are in the cigarette that could cause irritation which would lead to bronchitis and
emphysema, doesn't he?
A. Where does it say that, please?
Q. "As you know, we have investigated this subject in some depth and have made good progress in developing improved products along this line. Irritating effects are probably due to a variety of substances including ammonia, volatile acids, aldehydes, ketones, amines and phenols." Do you see that?
A. Yes, I do.
Q. And all of those are present in cigarette smoke, aren't they, sir?
*16 A. Well I don't know, sir.
Q. All right. Do you know if Philip Morris ammoniates its cigarettes?
A. I know that Philip Morris uses ammonia compounds in cigarettes, yes.
Q. You've testified about that in front of Congress, haven't you, sir?
A. I did, yes.
Q. And it also talks here about cardiovascular effects, doesn't it?
A. Yes, it does.
Q. And it talks about nicotine in that regard, doesn't it?
A. Yes, it does.
Q. And it says, "If forced to, we could produce a fairly tasty

low nicotine product." Correct?
A. It says that, yes.
Q. This was in 1963, correct, sir?
A. Yes.
Q. Now in 1963 Philip Morris didn't feel compelled to produce a fairly tasty low nicotine product, did it?
A. Well I don't know.
Q. Okay. It didn't produce one at that time, did it?
A. Well I don't know.
Q. Now Philip Morris also had knowledge of whether or not smoking caused pregnant women to have smaller children, correct?
A. Could you repeat the question, please?
MR. CIRESI: Yes. Would you read the question back, please.
(Record read by the court reporter.)
A. I have no knowledge of that, sir.
Q. Can you direct your attention to Exhibit 10270.
A. Yes, I have it.
Q. This is a memorandum to Dr. Wakeham from Dr. Fagan dated January 3rd, 1969?
A. Yes.
MR. CIRESI: We'd offer it, Your Honor.
MR. BLEAKLEY: No objection.
THE COURT: Court will receive 10270. BY MR. CIRESI:
Q. This is called "Smoking in Pregnancy: A Prospective Study Done in Britain," correct?
A. Yes.
Q. This was reported in the British Journal, correct?
A. It appears to be, yes.
Q. Now you'll see that in the first two paragraphs, sir, the methodology of the study is detailed. Do you see that?
A. Well I'll need to read it, if-- if I may.
Q. Yes.
A. Thank you.
Yes, that's right.
Q. Then starting in paragraph three, an analysis of the findings is provided, correct?
A. Yes. It says "Analysis of results shows the following."
Q. Okay. And one was that mothers who smoke had a lower

blood pressure than mothers who didn't smoke, correct?
A. That's what it says, yes.
Q. And mothers who smoke had a higher percentage of unsuccessful pregnancies, abortions, stillbirth, and neonatal deaths taken together?
A. That's what it says, yes.
Q. Did Philip Morris warn anybody of those consequences in 1969?
A. Not to my knowledge, sir. I think there's a health warning on the cigarette packs that were mandated by Congress.
Q. And when was that, sir?
A. Well I think it was 1969.
Q. For children?
A. I'm not sure.
Q. Pregnant women?
A. I'm not sure when the pregnant women health warning was introduced.
Q. Philip Morris, for example, never took out ads in the Wall Street Journal, New York Times, Minneapolis Tribune, St. Paul Pioneer Press, across the nation, advising consumers of this, did they?
A. Not to my knowledge, no.
Q. They've never done that to this day, have they?
*17 A. Not to my knowledge.
Q. And in subparagraph three -- or c) of paragraph three, do you see that it is reported by Dr. Fagan to Dr. Wakeham that the study took into consideration many factors such as maternal age, paternal age, socioeconomic status, educational level, maternal weight -- height, parity, et cetera, the non-smoking mother has a heavier baby than the mother who smokes, do you see that?
A. Yes, I see that.
Q. Now all of those factors, do you know if they're called confounding variables in an epidemiological study?
A. I don't know. I would say that they are certainly variables.
Q. And starting at the bottom on e), it's reported as follows by Dr. Fagan to Dr. Wakeham, "Babies born to smoking mothers grow faster and put on weight faster than babies

born to non-smoking mothers. By the end of the first year, the babies seem to be similar in weight and growth. The lower birth weight of babies born to smoking mothers is attributable to the toxic effects of smoke, particularly the carbon monoxide." Do you see that?
A. Yes, that's what it says.
Q. And then if you go down to paragraph five --
A. Uh-huh.
Q. -- there is reported by Dr. Fagan to Dr. Wakeham studies which looked at the effects of prematurity on child development. Do you see that?
A. Yes, Ido.
Q. And those studies pointed to the effects of cigarette smoking in the production of premature infants as defined by birth weight, correct?
A. Yes, that's what it says.
Q. And these reporters attributed that to the effect of the lower nourishment of the fetus through one of two mechanisms, correct?
A. That's what it says, yes.
Q. One was the effect of nicotine in constricting the uterine blood vessels and hence cutting down on the blood supply available to the fetus, correct?
A. Yes.
Q. And the other was to the effect of smoking in reducing the appetite of mother -- of the mother, and hence the supply of nutrients, particularly proteins, to the fetus, correct?
A. Yes, that's what it says.
Q. And it was found that the premature babies are more likely in later life to have physiological and psycological problems, correct?
A. That's what it says here.
Q. And those physiological problems and psycological problems could include depression, mental disease, couldn't they?
A. Where does it say that, sir?
Q. Could they? I'm just asking you.
A. Oh. Well I don't know.
Q. Could run the whole gamut of physical and mental

problems, couldn't it, sir?
A. I don't-
Q. As far as you know.
A. Well I don't know what they mean when they say that, sir.
Q. And do you see in the last paragraph, "All of the investigations of this type that smoking mothers have babies of lower birth weight than non-smoking mothers, and that these lower weight babies are more likely to experience problems later in life. Whether the mechanism is that of a slight poison' as suggested by Russell or whether the mechanism is through the reduced appetite of the mother is yet to be decided." Do you see that?
*18 A. Yes, I do see that.
Q. Now was any of this ever reported by Philip Morris to the public, to the consumers?
A. I don't know, sir.
Q. Since you have been CEO, you've never ordered that told to the consumers by taking out ads, have you?
A. No, I have not by taking out ads. I was once asked a question in an annual general meeting as to whether pregnant mothers should smoke, and I
said I thought it would be sensible if they didn't smoke.
Q. You did.
A. Yes, I did.
Q. Well then why didn't you tell your PR department, "Let's get this out. Let's use part of this 6.9 billion in cash flow and take out ads across the country to get the word out to the consumers," why didn't you do that?
A. Sir, there is a health warning on cigarette packs today that warn pregnant women not to smoke.
Q. But why didn't the company do it?
A. You know, I wonder if anybody in America believes cigarette companies when we say something like that, sir.
Q. Sir, yesterday you said that you would -- there would be a bigger impact if the company itself admitted these things.
A. Well I've now concluded that if we were to say something like that publicly, people wouldn't believe us.
Q. Do you think maybe, just maybe, Mr. Bible, the reason

they wouldn't believe you is that you folks stand alone against the entire world medical community and say smoking doesn't cause disease? Do you think that's possible?
A. I don't know, sir.
Q. You have no idea.
A. It might be. It might be.
Q. It's probable, isn't it, sir?
A. It's possible, sir.
Q. If people don't tell the truth, then when they try to tell the truth, somebody looks a little askance at it, don't they?
MR. BLEAKLEY: This is becoming argumentative.
THE COURT: It's becoming argumentative.
MR. CIRESI: I'll withdraw that question, Your Honor.
Q. Can you direct your attention, sir --
THE COURT: Counsel. Maybe we should take a short recess.
TUE CLERK: Court stands in recess.
(Recess taken.)
THE CLERK: All rise. Court is again in session.
(Jury enters the courtroom.)
THE CLERK: Please be seated.
THE COURT: Counsel.
MR. CIRESI: Thank you, Your Honor. BY MR. CIRESI:
Q. Mr. Bible, can you direct your attention to volume one, Exhibit 10270. You'll recall that's the document we just discussed, correct?
A. Yes.
Q. And that was dated January 3rd, 1969, correct?
A. Yes. Yes, that's correct.
Q. And it was to Dr. Wakeham by Dr. Fagan, correct?
A. Or Mr. Fagan. I don't know if he was a doctor or not.
Q. Can you direct your attention now to the exhibit directly before that, sir, which will be Exhibit 10269.
A. Yes.
Q. And do you see that's a document from Dr. Wakeham to Mr. Goldsmith?
A. Yes.
Q. And it's January 10th, 1969, or seven days later. Do you see that?
A. Yes, I do see that.

MR. CIRESI: Your Honor, we would offer Exhibit 10269.
MR. BLEAKLEY: No objection.
TI-IF COURT: Court will receive 10269.
* 19 BY MR. CIRESI:
Q. Now Mr. Goldsmith was the president of the company?
A. At that time do you mean?
Q. Yes.
A. I don't know if he was president at that time. He was president at some time, but I think it may have been later than that.
Q. He also was vice chairman, correct?
A. I think he was.
Q. Now here he is sending -- or receiving a memo from Dr. Wakeham regarding smoking and baby weight, correct?
A. Yes, that's right.
Q. And Dr. Wakeham reports to Mr. Goldsmith that we now have a study of the effect of smoking and pregnancy which supports previous conclusions
that smoking mothers produce smaller babies, correct?
A. That's what it says, yes.
Q. And he reports that the position of the medical people is that smaller babies suffer detrimental effects all through life, correct?
A. Yes.
Q. In other words, they have a diminished health status, correct?
A. I beg your pardon?
Q. They have a diminished health status is what he's reporting.
A. Suffer detrimental effects all through life.
Q. That would be diminished health status, right?
A. That's not what it says, but one could interpret it to mean that I guess.
Q. Yes. And he points out that, for example, in identical twins, the smaller one at birth has lower intelligence scores at age 10, correct?
A. That's what it says.
Q. And the assumption, of course, is that both twins have similar heredities and environments, correct?

A. That's what it says.
Q. And he then says that Dr. Fagan's summary of the studies is attached, correct?
A. Yes.
Q. Now do you know if Philip Morris had an opportunity subsequent to this to tell the American people about this study or about these studies?
A. Did we have an opportunity?
Q. Yes.
A. Well I guess we did have an opportunity.
Q. Okay. Do you know if there were any specific opportunities to specifically address this issue of mothers who smoke?
A. I don't know of any special forum that was created.
Q. Do you recall yesterday when we talked about Mr. Culiman's Face the Nation appearance on January 3rd, 1971?
A. Actually vaguely. I'm sorry to say that.
Q. Can you turn your attention to Exhibit 10492.
A. Yes.
Q. And that's the Face the Nation broadcast on January 3rd, -
A. The transcript.
Q. -- 1971. The transcript of it.
A. Right. That's right, yes.
Q. And the guest was Joseph Culiman III, chairman of the board, Philip Morris, right?
A. That's right, yes.
Q. And that's the same Joseph Culiman that sits in on board meetings now, correct?
A. That's right.
Q. Can you direct your attention, sir, to page -- and I'm referring to the Bates numbers -- Bates *560*. That's the last three numbers.
A. Yes, I have it.
Q. And you did notice, did you not, on the front page, that one of the reporters at this interview on Face the Nation was Morton Mintz?
A. Yes, I see his name. Uh-huh.
Q. Now I'd like to read a series of questions and answers and ask you some questions. Okay? If you'd direct your

attention to the bottom.
*20 "MIINTZ: Well, in view of the fact that you haven't -- they haven't been proved to be safe, what is the justification you would offer for spending -- according to one estimate I've seen -- three billion in the last 20 years to promote their use when there is that uncertainty, when we have an excess deaths of 200 to 300 thousand a year, when there is all this evidence, which you don't feel is conclusive -- what is the reason for promoting its use when it might cause cancer, heart disease and so forth?
"MR. CUELMAN: Well, I'd have to answer it this way, Mr. Mintz. There are a great many people in the United States and all over the world who enjoy smoking, who find it satisfies a very important need. We think those people are entitled to the best possible product we can produce. That is essentially our job."
Do you see that?
A. Yes, I do.
Q. Do you agree with that even today?
A. I think it's a fair characterization of how I feel. I believe that cigarettes are a legal product, I believe that people are very much aware of the risks associated with it, and I believe in those circumstances we should produce the best possible product we can.
Q. Okay. So you agree with in 1998 what Mr. Mintz -- or excuse me, Mr. Culiman said in 1971, correct? Fair statement?
A. I just said what I said, yes.
Q. Okay. Now Mr. Mintz goes on, "Now embryos don't have much choice, fetuses don't. They don't like to smoke. The British Medical Research Council did a study of all the 17,000 babies born in a single week in the United Kingdom, as you doubtless know. The Council found that those babies born to mothers who smoked during pregnancy were in significantly higher proportion small, weighing under five and a half pounds approximately, than the babies born to mothers who did not smoke, and there was a higher rate of stillbirths and of deaths within 28 days of birth. My question is, P view of this study, which is the largest and

most elaborate of its kind ever made, is it right to promote smoking among women with Virginia Slims and the other brands especially marketed for them with no warning as to the danger to the embryo that may exist?"
Now this was in 1971, correct?
A. Yes.
Q. Two years after the memos --
A. (Coughing) Excuse me.
Q. That's all right. Do you want some water, sir?
A. Thank you.
Q. Two years after the memos that we saw, the internal memos, correct?
A. Yes.
Q. And Mr. Culiman states, "Well, you are reading that question because it is a complicated question.
"MR. MINTZ: Yes, it is.
"MR. CUELMAN: I would say that I did read that report, and I concluded from that report that it's true that babies born from women who smoke are smaller, but they are just as healthy as the babies born to women who do not smoke. Some would prefer -- some women would prefer having smaller babies." Do you see that?
A. Yes, I do.
Q. And -- and do you agree with that statement today in 1998?
A. Well no, I wouldn't agree with it. I wouldn't say that today, sir.
*21 Q. And then Mr. Mintz said, "What about the higher rate of death?
"MR. CUELMAN. I'm not familiar with that."
Do you see that?
A. Yes, I do.
Q. Now the higher rate of death was in the memos we just saw from Dr. Wakeham.
A. Could you refer me back to that again, please?
Q. Yes. If you'd like to go back to 10269, sir.
A. Yes, I have it.
Q. And why don't you go to the next one, 10270. That might help a little bit more. Under 3 .b).

A. Uh-huh.
Q. "Mothers who smoke have a higher percentage of unsuccessful pregnancies (abortion, still-birth, and neonatal deaths taken together)."
Do you see that?
A. Yes, Ido.
Q. And that is a higher rate of death, correct?
A. I think that's a fair characterization of death, yes.
Q. And Mr. Fagan reported that to Dr. Wakeham, correct?
A. Yes, that's right.
Q. And Dr. Wakeham then reported that to Mr. Goldsmith, correct?
A. Yes, that's right.
Q. And when Mr. Cullman was on a national broadcast, he just said I'm not familiar with that, correct?
A. "What about the higher rate of death?" Mr. Mintz said.
Q. And what did Mr. Cullman say?
A. He said, "I'm not familiar with that." But the only question I'd ask is, is he talking about the higher rate of death of unborn children? I presume he is. That's what I'm –
Q. It would be fair to assume that based on the context.
A. I think that's fair, yes.
Q. Now, you said that the government required a warning, correct?
A. Yes.
Q. The government didn't require a warning until *1985*, isn't that right, sir?
A. I'm not sure of the exact date, sir.
Q. Let me hand you what has been marked as Exhibit 3824, which is the 1994 Surgeon General's report.
MR. CIRESI: And Your Honor, we'd offer Exhibit 3824.
MR. BLEAKLEY: I'm sorry, what was that? That was the Surgeon General's report?
MR. CIRESI: Yes.
MR. BLEAKLEY: No objection.
THE COURT: Court will receive 3824.
MR. CIRESI: May I approach, Your Honor?
THE COURT: Yes.
(Document handed to the witness.)

BY MR. CIRESI:
Q. Sir, I've opened it to page 264, and satisfy yourself by looking at the cover that it is the Surgeon General's report.
A. Yes, I have no doubt about it. I was just looking for the date, that's all.
Q. Now do you see on page 264 it shows various warnings and when they came into effect?
A. Yes, I do.
Q. And these are warnings that are required by the government to put on, correct?
A. That is right. By --
Q. Okay.
A. I think Congress determines it.
Q. And Philip Morris never put on any warning until it was required by the government, correct?
A. That is right, sir, yes.
Q. And in 1985 was when the Surgeon General's warning: Smoking by pregnant women may result in fetal injury, premature death and low birth
weight, correct?
A. Premature birth and low birth weight.
Q. Yes. And that is 16 years after Philip Morris had knowledge of this, correct, sir?
*22 A. From the date of that letter, yes.
Q. At least 16 years, correct?
A. Well 16 years.
Q. Now would you agree, Mr. Bible, that if a person is addicted to something, that her ability to exercise her free will is certainly limited?
A. Yes. It would be impaired, I would say.
Q. Be significantly impaired, wouldn't it?
A. It -- it would depend upon the level of addiction, it would seem to me, sir.
Q. So it could run a spectrum of limitation, is that right?
A. I would have thought so, yes.
Q. And you can't predict where an individual person may fall in that spectrum, correct?
A. I think that's a fair comment. I think most people -- most people are different, so we're all affected somewhat

differently.
Q. And would you agree that if people are addicted to cigarettes, that your company couldn't very well defend the cases by saying people had a
free choice?
A. Could you give me that question again, please?
Q. Sure.
Would you agree that if people are addicted to cigarettes, then your company couldn't very well defend cases by saying people had a free choice?
A. I find that a bit difficult to answer. I'm not a lawyer, but I would say that your choice is limited if you are addicted to something. I'd understand that certainly.
Q. Can you go to Exhibit 140 -- 14303, and that's in volume two. This is a document that's already in evidence, sir. It is a Tobacco Institute document, and it's from Mr. Knopick, who is a Tobacco Institute employee, to Mr. Kloepfer, who's a senior vice- president for public relations. Do you see that?
A. Well I see the names. I -- it doesn't say Tobacco Institute, but I'll accept that you're correct.
Q. It was produced in this litigation by The Tobacco Institute, and if you look at the bottom, you'll see a Bates number that is TIIVIN.
A. Yes, I see that.
Q. Okay. And the subject of this is the National Institute of Drug Abuse wanted "addictive" added to the cigarette warning. Do you see that?
Very first paragraph.
A. Yes, I do see that.
Q. And if you would direct your attention to the next page where Mr. Knopick is reporting, "I feel badly about my own lack of intelligence-gathering in this situation. But I don't think the questions I now raise are academic. Shook, Hardy reminds us" --
Do you know who Shook, Hardy is?
A. They're a law firm.
Q. They represent the tobacco industry, correct?
A. Well they represent Philip Morris, I know that.
Q. Okay. And they've represented Philip Morris for a long

time, correct, sir?
A. I don't know how long.
Q. Okay. "Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as free choice' if the person was addicted."' Do you see that?
A. Yes, I do see that.
Q. Okay. And Shook, Hardy gave that advice to your company?
A. Well I don't know.
*23 Q. You've never seen this document before?
A. No, I've never seen this document.
Q. Now do you know, sir, that nicotine is a poison?
A. I think I would say I would know that. It would depend upon the quantity.
Q. Okay. And you know that in sufficient doses it's fatal?
A. I would accept that.
Q. And do you know it's a physiologically active substance?
A. I don't know that.
Q. Do you know if it's similar to cocaine, a and morphine?
A. Do Iknow that it is?
Q. Yes.
A. No, I would disagree that it is.
Q. You would disagree with that.
A. Yes.
Q. You've never been told that.
A. Never been told what, sir?
Q. That it is similar to cocaine, atropine and morphine.
A. I think I've read that.
Q. Where did you read that?
A. I think I read that in the Surgeon General's report.
Q. Okay. Can you direct your attention to Exhibit 11559 in volume one.
A. 559?
Q. Yes.
A. Okay.
Q. 11559.
A. Good. I have it.

Q. Do you have it, sir?
A. Yes, Ido.
Q. And you see that this is a confidential memorandum, it~s entitled
"TABLE."
A. Yes.
Q. Now I asked you previously about TABLE. Do you remember that?
A. You asked me previously -- excuse me.
Q. About TABLE, Project TABLE.
A. Oh, yes. Yes.
Q. And I think you said you weren't familiar with it, is that right?
A. I've not heard that name, no.
Q. You haven't. Okay.
A.No.
Q. Now this is --
The title of this is "TABLE," correct?
A. Yes.
Q. It says "Competitive Analysis, Organization," and "Production." Correct?
A. Yes.
Q.And-
A. It says "Production - to follow." All right.
Q. And the name is B. Reuter. Do you know who Mr. Reuter is?
A. Yes, I do know Barbara Reuter.
Q. And who is Barbara Reuter?
A. She's an employee at Philip Morris.
Q. What is her position?
A. I'm not sure of her position today. My recollection of her was in the planning department.
Q. Planning department.
A. That was my recollection of her, yes.
Q. And you do not know what position she has today?
A. No, I don't.
Q. Okay.
A. She works for Philip Morris domestic cigarette operations.

Q. Can you--
There's no date on the front of this document, is there, sir?
A.No.
Q. Can you direct your attention to page four.
A. Yes.
Q. And I'm using the number at the bottom, not the Bates number.
A. Yes, I have page four.
Q. Need some more water?
A. I think I'm all right. Thanks.
Q. Now do you see here it says "Source: TMA Estimates (10/05/92)?"
A. No, I don't see that.
Oh, yes, I do. Thank you.
Q. Right under "Grand Total."
A. Yes, I've got it.
Q. Okay. Would it be fair to assume, sir, that the date of this memorandum is at least sometime after October 5th of 1992?
A. I think that's a fair assumption, yes.
Q. All right. Now can you turn back to -- and excuse me. Strike that.
*24 Do you know that this is a Philip Morris document?
A. Dolknowthat it is?
Q. Yes.
A. Well I would assume that it is because Barbara Reuter's name is on it. But I don't know if it is.
Q. I will represent to you that it is a Philip Morris document produced in this litigation. Did you provide this to Congress?
A. Did I provide this to Congress?
Q. Yes.
A.No,Ihaveno--Ihaveno-Well I have no recollection of providing it.
Q. Now if you go to page 665, the Bates number -- turn back -- it starts with the words "COMPETITIVE ANALYSIS" and it's the second page of the document.
A. Uh-huh.
Q. Now I'd like to direct your attention to the second paragraph.

A. Uh-huh.
Q. "Different people smoke cigarettes for different reasons. But, the primary reason is to deliver nicotine into their bodies." Do you see that?
A. Yes, I do.
Q. Do you agree with that?
A. Do I agree with that? No, I don't think so.
Q. You don't. Okay.
A.No.
Q. "Nicotine is an alkaloid derived from the tobacco plant." Do you see that?
A. Yes, Ido.
Q. And do you agree with that?
A. Well nicotine certainly comes from the tobacco plant, yes.
Q. Do you know if it's an alkaloid?
A. I think I do. I'm not quite sure what an alkaloid is.
Q. Okay. Then it states, "It is a physiologically active nilrogen containing substance." Do you see that?
A. Yes, I do.
Q. Do you degree with that?
A. I wouldn't have a clue frankly.
Q. You don't know.
A. No, I don't know.
Q. "Similar organic chemicals include nicotire, quinine, cocaine, atropine and morphine." Do you see that?
A. Yes, Ido.
Q. Do you agree with that?
A. I would have no idea.
Q. This is a Philip Morris document where that's reported, correct?
A. Yes, it's correct. It seems to me to be written by somebody who, to the best of my knowledge, never worked in our R&D department and has no scientific background, to the best of my knowledge.
Q. Is she a provocateur?
A. What do you mean by that, sir?
Q. Same thing Mr. Morgan meant yesterday in his deposition that we saw. And you witnessed it.
A. You mean does she attempt to provoke thought, stimulate

ideas?
Q. Is she a provocateur?
A. I have no idea.
Q. You don't.
Do you have any reason to believe she was lying in this document?
A. No, I have no reason to believe she was lying.
Q. Do you know her to be an honest person?
A. I expect she is very honest.
Q. Do you know her to be a responsible person?
A.Ido.
Q. Do you know her to do her job responsibly?
A. I do. But I don't know what her job was when she wrote this, but I certainly don't believe she's qualified to say these things because I don't
believe she's a scientist.
Q. You just don't agree with it, correct?
A. I beg your pardon?
Q. You don't agree with it, correct?
A. Agree with what?
Q. The last statement, "Similar organic compounds include nicotine, quinine, cocaine, atropine and morphine."
*25 A. No, I think what I said is I don't know.
Q. You don't know.
A. Hmm.
Q. "While each of these substances can be used to affect human physiology, nicotine has a particularly broad range of influence." Do you
agree with that?
A. I have no idea.
Q. Did you tell Congress that when you testified?
A. Tell them what, sir?
Q. What I just read.
A. Why should I have told Congress that?
Q. You were testit~ing on addiction in front of Congress, weren't you?
A. I was asked questions about that, yes.
Q. "During the smoking act, nicotine is inhaled into the lungs in smoke, enters the bloodstream and travels to the

brain in about eight to 10
seconds." Do you agree with that?
A. Do I agree with that?
Q. Yes.
A. I have no idea.
Q. Never talked to Dr. Ellis about that?
A.Idid-I have asked her some questions, but I never asked her that particular question.
Q. Did you ever ask her about the forms of nicotine and how fast they can get to the brain?
A. No, I have not. I have asked her about ammonia, and in the course of that she talked a little bit about the form of nicotine. But beyond that,
I've never asked her that question.
Q. Did she tell you at that time that nicotine with a higher pH gets to the brain faster?
A. No, she never told me that at all.
Q. Did you ask her?
A. Yes, I did. And what she told me was, if I remember correctly, was that ammonia -- sorry, nicotine absorbed through the mouth enters the brain more slowly than it does when absorbed through the lung. That's my memory of what she told me.
Q. Nicotine absorbed through the mouth enters the brain more slowly than when absorbed through the lung, correct?
A. That's what I remember her telling me, yes.
Q. Is that all she told you?
A. On what subject, sir?
Q. On that subject, sir.
A. Which subject?
Q. The subject of how fast nicotine gets to the brain.
A. Yes, I think that's all she told me.
Q. Did she tell you anything else about the form of nicotine and it getting into the bloodstream?
A. I think in the course of that conversation she told me that --
Could you rephrase the question, please, or repeat the question?
Q. Of course.

Did she tell you anything about -- else about the form of nicotine and how fast it gets to the brain or into the bloodstream?
A. No, I don't recall that, no.
Q. All right. Do you recall anything else that she told you in that conversation you had?
A. On what subject, sir?
Q. On the subject of nicotine getting into the blood system and getting to the brain.
A. No, I don't recall more else. I think what she told me I talked to Congress about, and that was the totality of what our conversation was.
Q. Well, you were preparing to testify to Congress - -
A. Uh-huh.
Q. -- when you talked to her, correct?
A. I had talked to her before, and then I talked to her again during that time, yes.
Q. You wanted her to give you all the information regarding what you were going to testify to Congress about, correct?
*26 A. Certainly to the best of what I expected I would be asked. I wanted to feel that I could answer questions honestly.
Q. You wanted to be honest and truthful and complete with Congress, didn't you?
A. Absolutely.
Q. You understood you had an obligation to do that, didn't you, sir?
A. Yes. I testified under oath.
Q. Now you're aware that the FDA has found that the cigarette is a nicotine-delivery device, correct?
A. The FDA has described it as such, yes, I believe that's true.
Q. And that the FDA, after looking at recently released documents and medical information -- and by "documents" I mean cigarette industry documents -- came to the conclusion that cigarettes are intended by the manufacturer to affect the structure and function of the human body. You're aware of that, aren't you, sir?
A. I am aware of that, yes.

Q. And it was based in part on the recently released documents that the FDA had, correct?
A. I'm not aware of that, sir.
Q. Do you have your deposition up there, sir? Do you have your deposition up there?
A. Where, sir?
Q. It may be to your right.
A. Oh, I see.
Q. The deposition is --
You may not have it, sir. Excuse me.
MR. CIRESI: Your Honor, may I approach?
TUE COURT: Yes. (Document handed to the witness.)
BY MR. CIRESI:
Q. Let me hand you a copy of your deposition, sir.
A. Thank you.
Q. And you recall giving a deposition on August 2 1st, 1997, in Palm Beach, Florida?
A. Yes, I do.
Q. And this was in the Medicaid action brought by the state of Florida?
A. Yes, that's right.
Q. You were under oath at the time?
A. Yes.
Q. And the FDA, sir, had determined that nicotine was a drug-delivery device after 1994, correct?
A. I think that's right, yes.
Q. And you know that this lawsuit here in Minnesota was brought in August of 1994, don't you?
A. Well no, I didn't know that, but I'm not going to argue.
Q. You know that substantial numbers of documents have been produced in this case, correct?
A. Yes, I'm aware of that.
Q. You know that they were under protective order so they could not be disclosed to various people. Do you know that?
A. They're under the protective order of the court?
Q. Yes.
A.Yes.
Q. And do you know that your attorneys designated the documents confidential to be covered by the protective

order?
A. I believe that's right.
Q. In fact, you've recently released all those documents on the Internet system, haven't you?
A. That's right.
Q. That was last Friday, correct?
A. That's right.
Q. And you did that as part of a commitment that you made to Congress on January 29th of this year, correct?
A. That's right.
Q. Now the FDA, sir, after 1994, got access to thousands of pages of internal company documents, didn't they?
A. Well I'm not sure, but I know they got access to a lot of documents.
Q. And that's what they based in part their finding on, isn't that right?
*27 A. Well I'm not sure.
Q. All right. Can you turn your attention to page 45 of the deposition that was taken of you last August 2 1st.
A. Uh-huh. Yes, I have it.
Q. And I want to direct your attention to that page 45 starting at line four.
A. Uh-huh.
Q. "Question: Mr. -- Mr. Bible, just as a general question, you are familiar, of course, with this big, thick document -- I'm not suggesting that you've read every page.
"Answer: I can guess what it is.
"Question: It's the rule making of the Food and Drug Administration, finding that cigarettes are nicotine delivery devices. You're generally - - you're aware generally they made such a thing as that?
"Answer: I am.
"And I've placed before you Exhibit 7-A, which is the executive summary, and I'd ask you, please, sir, kindly turn to page X. Are you aware that the Food and Drug Administration, after a considerable period of taking testimony, concluded that, quote, There is an emergence of a scientific consensus that cigarettes and smokeless tobacco cause addiction to nicotine and the disclosure of thousands

of pages of internal tobacco company documents detailing that these products are intended by the manufacturers to affect the structure and function of the human body. This new evidence justifies the agency's determination that cigarettes and smokeless tobacco are delivery systems for the drug nicotine.'

"Now, my question to you, sir, is, are you broadly aware that they made that finding?

"Answer: I am."

Is that correct?

A. That's correct, yes.

Q. Now that was just seven months ago, correct? Roughly.

A. Six months ago.

Q. Now when you testified in Congress, you called nicotine as having a mild pharmacological effect, and that it was behaviorally but not pharmacologically addictive, is that right?

A. I think that's what I said, yes.

Q. And you quoted from a company document in reading that, correct?

A. Yes. We'd made a document we submitted to Congress, and it's public.

Q. And who did you rely on in making the statement that it was behaviorally but not pharmacologically addictive?

A. My chief scientist.

Q. Is that Dr. Ellis?

A. Yes, that's Dr. Ellis.

Q. Okay. And what is the difference between pharmacologically addictive and behaviorally addictive, if you know?

A. Well I'm not a scientist, let me first start out by saying that, but I believe that pharmacologically addictive to me would, for example, include an objective marker such as intoxication, for example. Behaviorally addictive, say, I would identify that or define that as a habit where you repeat something frequently.

Q. Pharmacologically to you means intoxication?

A. I think that's one very important marker which to me would be important to the definition.

Q. Do you know what the word "pharmacological" means?
A. No, I don't. I've not looked it up in the dictionary.
Q. Never.
A. No, I haven't actually.
Q. Do you know if it means a drug effect?
*28 A. I would have thought that's probably what it means, yes. I wouldn't doubt that if somebody told me that's what it says.
Q. And the drug affects a person physiologically, correct?
A. Yes, it --
Physiological is a word I've never really fully understood, but if you could tell me what you mean by that.
Q. Well how about if it alters the state of the smoker by becoming a neurotransmitter?
A. My goodness, that's something I'm not familiar with, sir.
Q. How about if it affected the brain by that neurotransmitter, are you aware of that?
A. Well perhaps I could be guessing now a little, I don't like to guess, but perhaps that's what Dr. Ellis meant when she told me it was mildly pharmacological.
Q. Oh. So it would have a pharmacological effect.
A. I said it had mild pharmacological effects. I think I said that in Congress.
Q. Can you take a look at Exhibit *11559*. Same document we were on, sir. That's the --
A. Okay.
Q. That's the TABLE document. Very same page.
A. Yes, I have it.
Q. Okay?
A. Uh-huh.
Q. Now remember, I was reading to you that it travels to the brain in about eight to 10 seconds?
A. Yes.
Can you just point me to that again, please?
Q. Sure. Third paragraph.
A. Uh-huh.
Q. First sentence. See it?
A. Yes, I have it.
Q. Second sentence, "The nicotine alters the state of the

smoker by becoming a neurotransmitter and a stimulant. Nicotine mimics the body's most important neurotransmitter, acetylcholine (ACH), which controls heart rate and message sending within the brain. The nicotine is used to change psycological states leading to enhanced mental performance and relaxation." Do you see that?
A. Yes, I do.
Q. Were you ever told that by Dr. Ellis?
A. No, I don't think I was told that, no.
Q. And do you see there that neurotransmitters are referred to? Correct?
A. Yes, there is --
That word is there, you're right.
Q. Did you consider those to be pharmacological effects?
A. Which, sir?
Q. The effect on neurotransmitters affecting the body's most important neurotransmitter, ACH.
A. You know, I don't know.
Q. You don't know.
A. I don't know. I am not a scientist, sir.
Q. Do you think that's a mild pharmacological effect?
A. Sir, I would not know. I don't know what a neurotransmitter is, and I don't know what acetylcholine is.
Q.If--does-Do drugs sedate people?
A. I believe they do, yes.
Q. Is that a pharmacological effect?
A. Well I'd have thought that's a fair indication. But again, I'm a layman and I'd just be guessing at it.
Q. Would you call it mild?
A. Depends upon the drug.
Q. Okay. And --
A. For example, I've just taken some Sudafed, and I think that's mild. I presume that's a drug.
Q. Okay. Direct your attention, then, to the same paragraph, little bit further down, "A little nicotine seems to stimulate, while a lot sedates a person. A smoker learns to control delivery of nicotine through the smoking technique to create the desired mood state." Do you see that?
*29 A. Yes, I do.

Q. Sounds like a drug-delivery device, doesn't it, sir?
A. Doesn't to me.
Q. It doesn't to you?
A. No, it doesn't to me, because I'm a smoker. That's not how I view the cigarette.
Q. You don't view the cigarette that way.
A. No, I don't.
Q. Now did Dr. Ellis, before you testified in Congress, tell you that you can alter the form of nicotine to speed its delivery to the brain?
A. No, she never told me that, I don't think, no.
Q. Did she tell you that could be done through ammonia?
A. No, she didn't tell me that at all.
Q. Can you direct your attention to Exhibit 11751.
A. In fact, if I could just mention that I think she told me the reverse, in fact, which I just mentioned back to you, that in fact nicotine absorbed through the mouth reaches the brain more slowly than through the lung. I think that's what I was told.
Q. I'm talking about, sir --
I understand that. Did she tell you, though, that altering the form of
it from acid to base would speed its passage to the brain?
A. You've got me there. She didn't say that to me. I don't know what "acid to base" means, sir.
Q. Did she tell you the opposite of that?
A. I don't know, sir. I wouldn?t know how the opposite would be described.
Q. Can you direct your attention to Exhibit 11751, please.
A. Yes, I have that.
Q. Now that's a letter to Dr. Ellis, correct?
A. Yes.
Q. And it's dated November 15th, 1994, correct?
A. Yes, that's right.
Q. And it's from Cologne, the INBIFO Contract Research organization owned by Philip Morris?
A. Yes, that's correct.
Q. And sir, if you#d direct your attention to the last page, do you see that there's an enclosure which is an appendix of

two pages? It's
referenced there.
A. No, I don't see it, sir.
Q. Right at the very bottom under Mr. Reininghaus~s signature, "Enclosure: Appendix, 2 pages."
A. Oh, I see, it's written. I don't see any appendix, I see words saying that. Sony.
Q. All right. And if you go to the next exhibit - -
A. Yes.
Q. -- and you'll notice the next Bates number produced by your company, Philip Morris, Exhibit 11751, ended with the Bates number 912, didn't it?
A. Yes, that's right.
Q. And the next exhibit then is Exhibit 11752, at the top it says "APPENDIX," correct?
A. Yes. It says "APPENDIX 1" in fact.
Q. Correct. And the Bates number there is 913, correct?
A. Yes, that's correct.
Q. Okay. ii want you to assume that this is the appendix that was attached to Exhibit 11751. All right?
A. Yes, I -- I can assume that.
Q. All right. Now, we see the date here is November 15th, 1994, correct?
A. Yes.
Q. And I want to set the scene a little bit, sir.
A. Uh-huh.
Q. Congressional hearings had taken place in Congress, correct?
A. That year in 1994? Yes, I think it was April 94.
Q. And every one of the chief executive officers of the tobacco companies stood up and swore under oath that nicotine was not addictive, correct?
*30 A. That's my memory of what happened, yes.
Q. Philip Morris's CEO did that, correct?
A. That's my memory. And also he had the issue explained by these scientists.
Q. And the Waxman hearings had disclosed documents that had never before been disclosed, correct?
A. I don't recall that, sir. I won't dispute it, but I don't recall

that.
Q. And the FDA started investigating, correct?
A. The FDA, I think, had started prior to that. I remember Dr. Kessler making some report, I think, in February 94, not long before I became CEO. And-Q.So-
A. -- I think the congressional hearings were in April 94, so yes, he started his inquiry.
Q. So at that time there were FDA proceedings going on to look to regulate cigarettes as a drug, correct?
A. That's right, yes.
Q. We had the congressional hearings, correct?
A. Yes.
Q. The chief executive officers testified that nicotine was not addictive, correct?
A. That's correct, sir, yes.
Q. And between 1994 and 1998, there were no definitional changes in the medical literature regarding addiction, were there?
A. Not to my knowledge, sir.
Q. And Philip Morris started investigating between 1994 and 1998 in order to react to whether or not the form of nicotine had been deliberately changed to hasten its journey to the brain, correct?
A. I don't know about that, sir.
Q. Let's take a look at Dr. Ellis's information. Now you see that this is a letter to her of about four pages.
A. Uh-huh. Yes.
Q. And signed by Mr. Reininghaus, correct?
A. That's right, yes.
Q. Do you know who he is?
A. Yes. I believe he runs INI3IFO, the Research Institute.
Q. Okay. And Ms. Ellis is the director of research at Philip Morris at that time, correct?
A. I think that's right. Yes, she's addressed as such, yes.
Q. And still is today, correct?
A. I think she's senior vice-president. I've just forgotten her exact tide.
Q. She's still head of research?
A. No. I think that the activities have been divided. I'm just

not quite sure of the exact organization structure now. But she's a senior scientist at the organization.
Q. Now in this memorandum Mr. Reininghaus sets forth the uptake of nicotine by smokers, correct?
A. Yes.
Q. And he talks about it as being a complex process, correct?
A. He says that, yes.
Q. And he talks about the parameters which are expected to influence the bio -- bioavailability of nicotine, correct?
A. He says that, yes.
Q. And do you know that the bioavailability means its availability in the blood system?
A. No, I don't know that.
Q. You assume that to be a fair statement?
A. Well I'll accept it as a fair statement.
Q. And he talks, then, about those parameters. One is smoke production, correct?
A. Yes.
Q. The nicotine concentration in the smoke, right?
A.Yes.
Q. Particle size?
A. Yes.
Q. Nicotine phase distribution?
A. Yes.
Q. Do you know what that is?
*31 A. No, I don't.
Q. He talks about nicotine deposition and diffusion, correct?
A. Yes.
Q. Talks about two points under there, particle impaction and gas phase diffusional transport in the upper respiratory tract, correct?
A. Yes, correct.
Q. That would be the mouth, correct?
A. I would have thought the upper respiratory tract would have been here (gesturing towards throat area) where I would have thought.
Q. Okay. You don't know if it includes the mouth or not.
A. I don't know, sir, no.
Q. All right. And then he talks about that nicotine transport

in the lower respiratory tract, correct?
A. Yes, he does.
Q. And then he talks about nicotine uptake, correct?
A.Yes.
Q. And on the next page he talks about overall pharmacokinetics, correct?
A. Yes.
Q. Do you know if that refers to the speed by which nicotine is taken into the blood system?
A. No, I -- I wouldn't have a clue, sir.
Q. Okay. Now if you turn over to page three of this, - -
A. Yes.
Q. -- and do you see he says here, "Due to the selective membrane permeability only unprotonized nicotine can freely penetrate the mucosa or the bronchial alveolar lining."
A. Yes, I read that.
Q. All right. Now do you know what the bronchial alveolar lining is?
A. No, I don't.
Q. If I tell you it's the lining of the lung, would you accept that?
A. Well you're not a scientist, I presume, but it sounds reasonable.
Q. I'll grant you I'm not a scientist, sir.
Did you discuss that at all with Dr. Ellis before you testified in front of Congress?
A. Discuss which, sir?
Q. The bronchial alveolar lining.
A. No, I did not.
Q. Did you discuss the transfer of nicotine through the bronchial alveolar lining or through the lung membrane at the time you testified?
A. No, I didn't discuss that particular aspect, no.
Q. Now you see down right below -- or above number four -
A.Yes.
Q. -- it says, "However, an influence of smoke pH on nicotine kinetics in the lower respiratory tract cannot be excluded: pH-enhanced gas diffusion of nicotine to the mucosa might increase its uptake rate." Do you see that?

A. Yes, I do.
Q. Now if we go on, then, sir, to Exhibit 11752.
A. Uh-huh.
Q. This is the appendix. You remember that?
A. Yes. We presume it's the appendix. I think that's fair.
Q. "The Effects of Cigarette Smoke pH' on Nicotine Delivery and Subjective Evaluations." Do you see that?
A.Yes.
Q. Now I want to represent to you, sir, that delivery is the amount of nicotine, not the form. Will you accept that? Are you with me?
A. Well I don't really -- I don't really know the distinction between the two, frankly.
Q. That's --
Well we're going to see if-- if you do or don't.
A. Okay.
Q. I'd just like you to assume that the delivery is different than the form of the nicotine. All right?
A. Well I'll try, yes.
Q. All right. And you didn't have any discussion about that with Dr. Ellis?
*32 A. About what, sir?
Q. About the form versus delivery of nicotine itself.
A. It wouldn't occur to me. I don't even know what it means, as I said to you.
Q. Well you knew you were going to testify in Congress about whether or not you were manipulating nicotine to increase the addictive nature of
cigarettes, weren't you?
A. I didn't know that.
Q. You didn't --
A.No.
Q. -- at the time you testified?
A. I didn't know what I was going to be testifying about in Congress, sir. They generally asked me the questions.
Q. Well that was one of the subject matters that you knew you were going to be asked about, wasn't it?
A. Well I thought I might be asked about it.
Q. Okay. And that was whether or not Philip Morris was

manipulating
nicotine through ammoniation to increase its speed to the brain, correct?
A. I thought that I would be asked a question as to why we used ammonia in our products.
Q. Okay. Now I'd like to start in the second paragraph. And if you want to read the first paragraph, please do so, sir.
A. Well thank you.
Q. Are you ready?
A. Well not quite. Could you just bear with me, please?
Q. Oh, I will.
A. Yes. Little hard for me to understand, I have to tell you that. However, I've read it.
Q. Complex area, correct?
A. I beg your pardon?
Q. Complex area.
A. Well that, I guess, is why I'm not a scientist.
Q. And how many smokers do you think are scientists?
A. I don't know, sir.
Q. Would you agree with me it would be fair to assume that the overwhelming majority are not scientists?
A. I think that's probably a fair --
You know, a majority of the citizens of the world are not scientist, so
I think that's fair.
Q. And would you agree with me that the overwhelming majority do not have scientists at their disposal to explain complex chemical matters?
A. Yes, I would agree with that.
Q. Now in paragraph two we see it's reported as follows: "The argument that bases" --
Now do you know if ammonia is a base?
A. I don't know what a base is, sir.
Q. All right. I'd like you to assume that ammonia is a base. It's been so testified here. Can you assume that?
A. You know, honestly I don't know what a base is to assume that. I know a base in baseball, but that's about the only base I do know of.
Q. We're not talking about baseball, sir.

A. I know we aren't, sir, but I don't know what a base is.
Q. We're talking --
With all due respect, Mr. Bible, we're talking about matters of life and death. We're not talking about baseball. Do you understand that, sir?
A. Sir, I was trying to explain to you I don't understand what "bases" mean.
Q. And I ask you to assume that a base is ammonia. Can you do that?
A. I'll try, yes.
Q. Thank you.
"The argument that bases are added to increase the nicotine delivery above normal levels" -- nicotine delivery above normal levels -- "is entirely specious." Do you see that?
*33 A. Yes, I see that.
Q. All right. Now that's the delivery, the amount of nicotine, do you know that? If you don't, just tell me you don't know.
A. I would --
No, I think that's fair. To -- to increase the nicotine delivery would
be to increase the amount of nicotine. I think that's a fair assumption.
Q. All right. The same amount of nicotine is delivered whether the smoke is acidic, basic, or neutral." Do you see that?
A. That's what it says, yes.
Q. "Only the form, not the amount of nicotine is changed."
A. Yes, that's what it says.
Q. "To illustrate, a study was conducted on nicotine aerosols, where subjects inhaled the same amounts of nicotine at pHs of 5.6, 7.5 and 11.0."
A. Uh-huh.
Q. "It was found that higher peak concentrations of nicotine in blood were achieved at higher pHs. Since the amounts of inhaled nicotine were the same, the results indicate that the higher the pH, the more rapidly nicotine enters the blood stream. Eventually, of course, all of the nicotine, regardless of pH, would enter the blood stream. Only the rate of entry is pH dependent." Do you see that?

A. Yes, I read that.
Q. Next paragraph. "We conducted a study comparing the electrophysiological and subjective effects produced by smoking cigarettes containing nicotine as the base to the effects produced by smoking nicotine as the citrate." And you know that a citrate is a salt?
A. Yes.
Q. Yes.
A. I think I do, yes.
Q. "Equimolar amounts of nicotine were used. We found that, compared to cigarettes containing the citrate, cigarettes containing the base produced enhanced electrophysiological and subjective responses. It is of interest to note the filler Us for the base and the citrate cigarettes were 6.4 and 5.2, respectively. Nicotine delivery levels, however, were not different."
Next paragraph.
A. Uh-huh.
Q. "We conducted a study assessing the effects of increase filler pllon electrophysiological and subjective responses to cigarettes." They're testing them on people, correct, sir? Is that correct?
A. No, I have no ideas, sir. I think this is an animal laboratory --
Q. You do. Okay.
"The cigarettes contained 0, 1 or 2 calcium hydroxide. Filler pHs were 5.7, 6.6 and 8.0, respectively. The corresponding nicotine deliveries were 0.34, 0.32, and 0.31 milligrams/cig. It is clear from these data that filler pH has no effect on nicotine delivery. We found that increased filler pH resulted in enhanced electrophysiological and subjective effects. We interpreted this data to mean that the higher pHs resulted in more unprotonated nicotine - a physiologically – a more physiologically effective form." Do you see that?
A. Yes, I do.
Q. Now before you testified in front of Congress, did Dr. Ellis tell you about that?
A. Tell me about what, sir?
Q. What we just read.

A. No, she did not. No.
Q. You didn't know this when you testified?
A. I didn't know --
*34 The contents of this paper that you just read out?
Q. And when you testified, you were very careful about what you said, didn't you?
A. I'm always very careful about what I say. I try to be, sir.
Q. And if you could direct your attention to Exhibit 24299.
A. Yes, I have that.
Q. And you see that that's a copy of the January 29th, 1998 session in Congress?
A. Yes, that's right.
MR. CIRESI: Your Honor, we'd offer Exhibit 24299.
MR. BLEAKLEY: Your Honor, there's a lot of information in here other than the testimony of Mr. Bible.
THE COURT: Has this been designated, counsel?
MR. CIRESI: It has, Your Honor.
THE COURT: Received. BY MR. CIRESI:
Q. Now I want to direct your attention, sir, to page 72. Are you testifying on that page in response to questions by Representative Gillmor?
A. Yes. And others.
Q. Okay. Now I'd like to direct your attention, sir, about halfway down
A. Uh-huh.
Q. -- where --Oops, if you could move it back just a little bit, please, Ms. Sutton. Thank you.
Do you see there where it says:
"REPRESENTATIVE GILLMOR: Yeah, I'll -- I'll yield?"
A. Yes, I do see that.
Q. That means he gives up the floor to another congressman, correct?
A. That's right.
Q. Okay. And the next congressperson then addresses you with a question, correct?
A. Yes.
Q. "To follow up on your question about the nicotine levels, I had in my initial question asked you about whether some of the companies here ammoniate, paren, pH, close paren,

tobacco in their process. And so I'm wondering, Mr. Bible and Mr. Goldstone" --
Mr. Goldstone, he's the CEO from RJR, right?
A. That's right, sir, yes.
Q. -- "if you could comment on whether your company ammoniates its tobacco in its production now, or if it has in the past, and whether that
in fact potentiates the level of nicotine." Correct?
A. Yes, that's what it says.
Q. Now you were very careful how you answered this question, weren't you, sir?
A. Sir, I answered the question.
Q. I know you did.
A. And I answered it as intelligently as I could answer the question.
Q. Did you--
Did you read this answer?
A. No, sir, I didn't read this answer.
Q. But this answer was based on how you were prepared by Dr. Ellis, correct?
A. No, it was based on how I asked her these questions about ammonia, and that's what she told me.
Q. And what she told you.
A. Uh-huh.
Q. And she didn't tell you about Exhibits *17751* and *17752*, did she, sir?
A. No, she didn't. I think I asked her specifically about this subject because, as I said, it had been very topical.
Q. Yeah. And that's how you answered. "Yes, well, that's a topical subject, because quite a bit has been written about it. So I've asked no scientists about that subject."
Who else did you ask besides Dr. Ellis?
A. Well I really meant Dr. Ellis.
Q. "And I'm told that ammonium compounds are used in two ways in our products. In the first instance they are used as a blending agent in the manufacture of what is called sheet tobacco, which is included in the cigarette. And that blend -- its capability there is to act as an agent to release the pectins to cause the tobacco to bind and become a sheet." Do

you see that?
*35 A. Yes, I do.
Q. Two kinds of sheet tobacco, though, aren't there, sir?
A. I believe there are, but I'm not familiar with the differences.
Q. One is band cast and one's called RL, reconstituted leaf, correct?
A. I've heard that, yes.
Q. And there are no pectins released in reconstituted leaf through the action of ammonia to bind, are there?
A. Sir, I was told by Dr. Ellis that in order to release the pectins to cause the sheet to bind, ammonia was added.
Q. Do you know if that's true in both band cast and reconstituted leaf?
A. I -- I don't know, but it certainly is true in one of them, sir.
Q. In one of them.
A. Yes.
Q. You know it's true in only one, and that's band cast, isn't that right, sir?
A. I don't know that, sir. In fact I've never heard the word "band cast" in my life, I don't think.
Q. But you just said that you knew it was true for at least one, didn't you?
A. Well I thought there was -- that all sheet was similar, frankly, sir.
Q. You said, "I don't know, but it certainly is true in one of them."
A. Well because you'd been saying there were two.
Q. Ah. Okay.
You go on to testify, "But I'm also told that the ammonium compounds that are used in the cigarettes we sell do not cause the amount of nicotine
in smoke to rise."
That's the delivery, right?
A. Well yes. I think they're synonymous, yes.
Q. Yes. "They do not cause the amount of nicotine absorbed by the lung to rise. It does not change the form of the nicotine that goes to the
brain." Do you see that?

A. Yes, I do see that.
Q. And that's directly contrary to Exhibit 17 -- 11751 and *11752* that we just looked at, isn't it?
A. Oh, I don't know. I couldn't --
Q. Just don't know, is that right?
A. No, I couldn't say that, sir. If I'd read what you read, I couldn't describe that as being contrary to what was said there at all.
Q. You couldn't.
A. No, I could not. I'm not a scientist and I found that very complex. I can tell you this is what Dr. Ellis told me, and I believe her, she's a very fine scientist.
Q. Well if you--
A. And I have no doubt whatsoever about the truth behind this.
Q. But we just read about the form of the nicotine getting there faster when pH is raised, didn't we, sir?
A. Well could you take me back to that, please, sir.
Q. Sure. Would you go back to Exhibit 17 -- or *11752*.
A. *11752*.
Q. And I will direct your attention to the second paragraph, halfway through it. Well let's start up above. We'll read it again.
"The argument that bases" --
Remember, I asked you to assume that a base is ammonia?
A. Yes.
Q. -- "are added to increase the nicotine delivery above normal levels is entirely specious." Okay? "Specious" means false, correct?
A. Yes.
Q. And the delivery is the amount of nicotine, correct? That's what you said earlier.
A. Well you asked me to assume that, I think. So I think that's a fair assumption, but I'm not going to quibble over it.
*36 Q. "The same amount of nicotine is delivered whether the smoke is acidic, basic, or neutral." Do you see that?
A. Yes, I see that.
Q. "Only the form, not the amount of nicotine is changed." Correct?

A. That's what it says, yes.
Q. "To illustrate, a study was conducted on nicotine aerosols, where subjects inhaled the same amounts of nicotine at pHs of 5.6, 7.5 and 11.0."
Do you see that?
A. Uh-huh. Yes, I do.
Q. "It was found that higher peak concentrations of nicotine in blood were achieved at higher pHs." Correct?
A. Yes, that's what it says.
Q. "Since the amounts of inhaled nicotine were the same, the results indicate that the higher the pH, the more rapidly nicotine enters the blood system." Isn't that what it says?
A. "...enters the blood stream."
Q. "Blood stream." Isn't that what it says?
A. That's what it says, yes.
Q. Now let's go back to your testimony, sworn testimony in front of Congress.
A. Uh-huh.
Q. "But I'm also told that the ammonium compounds that are used in the cigarettes we sell do not cause the amount of nicotine to rise." Do you see
that?
A. Yes, I do see that.
Q. And we said that that would be the delivery, correct?
A. Well I think you said that. I see here it says "delivery" and not "amount," actually.
Q. Well, and -- and you accepted --
A. Well --
Q. You accepted that, didn't you, sir?
A. Well I did, but now I'm beginning to wonder if there's something I don't understand here.
Q. Well --
A. If there is a difference between the two.
Q. Let's go on a minute, sir.
A. Hmm.
Q. "They do not cause the amount of nicotine absorbed by the lung to rise. It does change the form -- it does not change the form of nicotine
that goes to the brain." You said that, right?

A. That's what I said, yes.
Q. Who told you that?
A. Dr. Ellis.
Q. When did she tell you that?
A. Before I went to Congress.
Q. When it gets into the bloodstream, is it buffered?
A. I have no idea, sir. I don't know what that means, "buffered."
Q. Did you ask?
A. No, I didn't. I wouldn't think to ask it because I don't know what it means.
Q. Did she explain anything about that to you?
A. I don't recall that, no. I don't recall that.
Q. Did she tell you that, "Mr. Bible, when you ammoniate, you get the nicotine into the blood system faster, but once it's into that bloodstream, it is buffered by the blood and so it doesn't change on the way up?" Did she tell you that?
A. I don't recall that, sir.
Q. Did she tell you, "Now if you answer that way, you won't be stating a mistruth?"
A. If I answer what way?
Q. The way that I just said. You won't be stating a mistruth, but you won't have to answer about whether --
A. No, no, that's --
Q. Excuse me, let me finish.
A. Sorry.
Q. -- but you won't have to say whether or not we ammoniate to get it into the blood quicker. Did she tell you that?
*37 A. No, she never said anything like that to me at all.
Q. And she never gave you this document, did she, sir?
A. Which document, sir?
Q. The document we've just looked at, *11752.*
A. No, I don't --
I've not seen that before. And as I said, I really feel quite incapable of interpreting it.
Q. Well did you offer to have Dr. Ellis testify on this issue and produce all of the documents that were in Philip Morris's files regarding

this?
A. I think I've offered for my chief scientist to elaborate on any points that were made. In fact it may have been in that testimony there.
But I have certainly offered that, yes.
Q. With all of the internal documents?
A. I think I said at that congressional hearing we are releasing all documents which we started to release on the Internet last Friday. I think
you referred to that.
Q. You didn't release 39,000 of those documents, did you?
A. That's right. They're privileged documents.
Q. They have been found by a special master not to be privileged, correct?
MR. BLEARLEY: Objection, Your Honor, that is highly prejudicial and irrelevant.
THE COURT: Sustained.
MR. BLEARLEY: Move to strike it.
THE COURT: That question will be stricken. The jury is instructed to disregard that.
BY MR. CIRESI:
Q. Sir, how many of your documents have you said you will turn over?
A. When I talked to Congress?
Q. Yes.
A. I think we said there are some 30 million pages of documents here in Minnesota that we will be releasing.
Q. And you had never agreed to release those documents before you went to Congress, correct?
A. That's right, yes. Yes.
Q. And those documents relate back to over 40 years of the industry's conduct, correct?
A. I don't know how far they go back, but I think they go back a long time, yes.
Q. And they go back and show what the industry knew and when they knew it and what they did about it, correct?
A. I'd have thought that's a fair characterization. I've not read them, sir, there are so many. But as I said, I'm looking forward.

Q. You're looking forward to read them?
A. I'm looking forward --
Q. Oh. I-
A. -- to resolve the issues surrounding this industry and my company, sir.
Q. Well we'll -- we'll get to that in a little bit, sir.
A. Uh-huh.
Q. And I know you're looking forward because you've testified to that, haven't you?
A. I have.
Q. And we looked at how you were looking forward based on the article in the Wall Street Journal and your 1994 annual report. We looked at that, didn't we?
Q. The annual report, yes, that's right, sir.
Q. And you put in there that you had never settled a case, isn't that right?
A. That's right, sir. Yes.
Q. And when all the documents started coming out, things changed, didn't they, sir?
A. What do you mean by that, sir?
Q. What I mean by that is you started settling some cases, didn't you?
A. We've settled some cases lately, yes, we have.
*38 Q. Yes.
A. But that was in order to make sure that the proposed resolution which we've agreed with states attorneys generals were clear and we'll have, I think, a good pathway for national legislation to be legislated - -or enacted.
Q. Yes, and --
A. And the attorneys general wanted --
Q. Sir.
A. -- to settle them, too.
Q. Are you done?
A. I am, yes.
Q. Now those settlements came about after documents were disgorged by your companies and the others that had never before seen the light of day, correct?
A. Of that I'm not sure.
Q. You don't know?

A. No, I don't.
Q. Well you just testified that you're going to release documents that had never before been released, isn't that right?
A. I think you asked me if they'd not been released. I said yes, I think that's right. But I just don't know, sir.
Q. Oh.
A. I'm not trying to quibble with you, I just don't know.
Q.I know you're not trying to quibble. I'm not trying to quibble with
you either.
A. Well thank you.
Q. But just a bit ago you said they've never been released, isn't that right? Now maybe that's a quibble, but --
A. The 30 million pages?
Q. Yes.
A. You really are confusing me.
Q. I don't want to confuse you, Mr. Bible.
A. Well please, if you could be very clear, I will try my very hardest to answer your questions exactly, clearly. So please if you would repeat them.
Q. I will go back for you --
A. Thank you.
Q. -- so we are not quibbling and you understand it. Documents were released on Friday that had never before been released to the public, correct?
A. Well I think that's correct.
Q. And those documents came from the Minnesota depository, correct?
A. Yes, that's right.
Q. And the documents were placed in the Minnesota depository as a result of this lawsuit, correct?
A. I believe that's correct.
Q. And documents were placed in England in a depository, correct?
A. I believe that's correct.
Q. And those documents have not been released yet on the Internet.
A. I -- I don't know about that, sir.

MR. CORRIGAN: Objection, Your Honor, that's the subject of a pending motion before the court.
THE COURT: And do you want the answer stricken, counsel?
MR. CORRIGAN: I was not able to hear the answer, Your Honor, because I was making an objection.
THE COURT: I wasn't either because you interfered. We've been through this before. I'll sustain your objection and strike his answer, whatever it may have been.
MR. CORRIGAN: Thank you.
THE COURT: Okay.
BY MR. CIRESI:
Q. Now, these documents that have been discovered over the past four years in this case were provided to the other states, weren't they?
A. I don't know that, sir.
Q. Have you heard the term "the Minnesota select documents?"
A. Yes. Congressman Bliley raised them with me, yes.
Q. He did.
A. Yes, he mentioned that. I didn't know what he was talking about, frankly.
*39 Q. And Congressman Bliley -- I'm not talking about recently, but a while back -- subpoenaed some documents, didn't he?
A. Yes, he did.
Q. And those were from Minnesota, correct?
A. I believe that's right.
Q. And those were turned over, weren't they?
A. I believe they were, yes.
Q. And they led to the subsequent hearings that you went to, isn't that correct?
A. Well I don't know if they led to the hearings or not. I don't know that's the case.
Q. You and others were asked about those documents, weren't you?
A. At the -- at the congressional hearing?
Q. Yes.
A. I can't recall that.

Q. But it was at those hearings where you first said publicly that nicotine was addictive, isn't that right, sir?
A. I made my position clear -- or our company's positions clear at that congressional hearing.
Q. Cigarettes were addictive.
A. Well would you like me to say exactly what I said?
Q. You may say exactly what you said, sir.
A. Well thank you, because I would like to be able to read it. We went public with this statement in October 1997 and we said on the subject of addiction that we recognize that nicotine as found in cigarette smoke has mild pharmacological effects and that under some definition cigarette smoking is addictive. The word "addiction" has been and is currently used differently by different people in different contexts, and the definition of the term has undergone significant changes over the past several decades. In 1964, for example, the Advisory Committee to the Surgeon General of the United States concluded that smoking, although habit-forming, did not fit within its definition of addiction. However, ii 1988 the Surgeon General redefined the term and concluded that smoking is addictive. We have not embraced those definitions of addiction which do not include historically accepted and objective criteria such as intoxication and physical withdrawal as important markers. We acknowledge that our views are at odds with those of the public health community, but in the last analysis there is little point to a continuing public debate about the definition of a word used both colloquially and technically to describe many different kinds of behavior. We continue to believe that people can quit smoking if they resolve to do so, but we recognize that it can be difficult to quit. Accordingly, to ensure there is a single consistent public health message on the issue of addiction, we will refrain from debating the issue other than is necessary to defend ourselves and our opinions in the courts and other forums in which we are required to do so, and we will also defer to the judgment of the public health authorities as to what health warning messages concerning addiction will best serve the public interest as reflected in the

proposed new health warnings. That's the statement.
Q. Who wrote that for you?
A. I beg your pardon, sir? Q. Who wrote that for you?
A. That was drawn up, I think, by our scientists and our lawyers together, and myself
*40 Q. Did they use the internal documents of Philip Morris to draw it up?
A. I have no idea, sir.
Q. Now, they said that in 1964 the Surgeon General said it was habituation and not addictive, correct?
A. I think he said it was habit-forming.
Q. Habit-forming. And you saw in your own deposition you recognized that after all kinds of internal secret documents came out, the FDA took a different position on nicotine and its addictiveness, isn't that right? In cigarettes.
A. Could you remind me what I said, please?
Q. I certainly will, sir. Do you have your deposition in front of you?
A. Yes.
Q. Would you look at page 45.
A. Mine starts at page 48 actually.
Q. Your deposition, sir.
A. Oh, my deposition. Sorry.
Q. Do you remember the question?
A. Yes.
Q. "And I place before you Exhibit 7-A, which is the executive summary, and I'd ask you, please, sir, kindly turn to page X. Are you aware that the Food and Drug Administration, after a considerable period of taking testimony, concluded that There is a emergence of scientific consensus that cigarettes and smokeless tobacco cause addiction to nicotine and the disclosure of thousands of pages of internal company documents detailing that these products are intended by the manufacturers to affect the structure and function of the human body. This new evidence justifies the agency's determination that cigarettes and smokeless tobacco are delivery systems for the drug nicotine.'
"Now my question to you, sir, is, are you broadly aware that

they made that finding?
"Answer: Yes, I am."
Now you gave that under oath.
A. Yes, that's right.
Q. And I think you said, oh, it was more like six months ago, when I asked you if it was seven. Remember that?
A. You mean this morning.
Q. Yes.
A. Well yes. Isn't it six months ago?
Q. Now-
A. August.
Q. In 1964 did the tobacco companies provide all their internal documents to the Surgeon General regarding nicotine and its addictiveness?
A. Which year, sir?
Q. 1964.
A. Not to my knowledge. I don't know.
Q. And shortly after the 1964 Surgeon General's report came out, did the World Health Organization change its definition of addiction?
A. I don't know.
Q. Have you asked that question?
A. I don't think I have, sir.
Q. In 1988 did the Surgeon General find that nicotine is addictive and cigarette smoking is addictive?
A. Yes, I believe he did.
Q. And-
A. As I have said in my statement.
Q. -- in 1988 did the defendants, your company and the other manufacturers of cigarettes, provide to the Surgeon General all of the documents you had internally regarding the addictiveness of cigarette smoking?
A. I don't know, sir.
Q. Nobody's ever told you they did.
A. No, nobody's ever told me they have.
Q. The fact is those documents didn't come out until after this lawsuit was started, isn't that right, sir?
A. Well I don't know, but it may be a fair assumption.
*41 Q• Let's take a look at some of the documents your

company had over the years --
A. Uh-huh.
Q. -- that were not provided to public health authorities.
MR. BLEAKLEY: Your Honor, we've going for about an hour and a half and it's a quarter to 1:00. I wonder if this would be an appropriate time to break for lunch.
THE COURT: I think it's been about an hour and 15 minutes, but I think
we can break for lunch.
We'll reconvene at 10 minutes after 2:00.
THE CLERK: Court stands in recess.

(Recess taken.)

THE CLERK: All rise. Court is again in session.
(Jury enters the courtroom.)
THE CLERK: Please be seated.
THE COURT: Counsel.
MR. CIRESI: Thank you, Your Honor.
Good afternoon, ladies and gentlemen. (Collective "Good afternoon.")
BY MR. CIRESI:
Q. Good afternoon, Mr. Bible.
A. Good afternoon, sir.
Q. When we recessed, I said we'd like to visit with you a little bit about the Philip Morris documents regarding nicotine and addiction. Do you
recall that, sir?
A. Yes, I do.
Q. Can you direct your attention to Exhibit 10255, which is in volume one, sir. Do you have it, sir?
A. Yes, I do.
Q. All right. And you see this is a Philip Morris interoffice correspondence marked "PERSONAL & CONFIDENTIAL" dated August 12th, 1980, correct?
A. Yes, correct.
Q. And it's to Dr. R. B. Seligman and directors, correct?
A. Yes.
Q. Who are directors?

A. Who are the directors?
Q. Yes.
A. Today or then do you mean?
Q. That would be the board of directors, correct?
A. Well I don't know. I would --
That's what I would imagine it to mean.
Q. Okay. And this is back in 1980, and it's a memo from Dr. Osdene, correct?
A. Yes, it is.
Q. And you know Dr. Osdene testified here by way of deposition.
A. I knew he came -- or I knew he testified, yes.
Q. Okay. And the subject of this is "Evaluation of Major R&D Programs," correct?
A. Yes.
Q. So the board was being advised of major R&D programs that were being suggested by Dr. Osdene and which he felt were in order of the highest priority, correct?
A. Well yes. I would just perhaps qualify what I said earlier. You -- I don't know if that would be the board of directors or directors of Philip Morris U.S.A. where many people have titles, directors of the particular function.
Q. Sir—
A. So I don't know. It could be and it could not be, I just don't know.
Q. Fair enough. It's either the directors of Philip Morris U.S.A. or the board of directors, correct?
A. That would be right, yes.
Q. And number five, do you see that, "Nicotine Program?"
A. Yes, I do.
Q. "This program includes both behavioral effects as well as chemical investigation. My reason for this high priority is that I believe the thing we sell most is nicotine." Do you see that?
*2 A. Yes, I do.
Q. Now did Philip Morris, to your knowledge, ever publicly advise consumers that the thing they sell most is nicotine?
A. Not to my knowledge, no.
Q. Has it ever so advised the public during the course of

your tenure as CEO and chairman?
A. No, because I believe we sell cigarettes and other products.
Q. Okay. It has never so advised, is that correct?
A. That's correct, sir, yes.
Q. Can you direct your attention, sir, to Exhibit 18 -- before we --
Let me ask you one thing about this. Did Philip Morris ever provide this to the Surgeon General?
A. Which, sir?
Q. Exhibit *10255*.
A. I don't know.
Q. Is this one of the documents that just was recently released last Friday?
A. Well I don't know.
Q. Well if it was part of the Minnesota documents that you produced over the last four years, is it fair to assume that it was released last
Friday?
A. Well I would have thought so, it's one of the 30 million pages, yes.
Q. Well you didn't have 30 million pages in there, did you, sir?
A. No, but I thought all the documents totaled 30 million pages.
Q. Do you know how many there were here in Minnesota alone of those what you call 30 million?
A. No, I don't. I thought they were all here in Minnesota actually.
Q. All right. Are you aware of a depository in England?
A. I've read about that. Certainly Philip Morris doesn't have a --doesn't have a depository in England.
Q. And how many Philip Morris documents were provided to the Minnesota depository, if you know?
A. No, I don't know.
Q. Now if this was one of those, then the first time it would have been made public would have been on the Internet last Friday, correct?
A. If it was one of those.

Q. Please direct your attention, then, to Exhibit 18089, which would be in volume two, sir.
A. Yes, I have that.
Q. Now you know who Dr. Dunn is?
A. I've heard his name.
Q. He was in the research and development department at Philip Morris, correct?
A. Yes, that's my understanding.
Q. For a long time, correct?
A. I don't know.
Q. If you could, sir, would you direct your attention - -
This is called, by the way, "MOTIVES AND INCENTIVES IN CIGARETTE SMOKING," correct?
A. Yes, that's the title.
Q. And have you ever seen this document before?
A. No. It means nothing to me. I don't recollect ever seeing it.
Q. All right. Let me represent to you that it's Dr. Dunn's report on a meeting that took place among 25 scientists on the Dutch side of St. Martin
in 1972. Can you accept that, sir?
A. Well I'll accept that, certainly.
Q. All right. And if you would turn, then, to page four.
A. Yes, I have that.
Q. All right. And I'd also like to represent to you that the San Martin conference was called by The Council for Tobacco Research. Can you assume that?
A. Well if you tell me that, I'll assume that, yes.
Q. Well why don't you turn to the previous page and you'll see that it was. Second full paragraph.
*3 A. That page --
Page three?
Q. Page three, yes. The San Martin conference was called" --
A. Yes, that's what it says.
Q. All right. Now turn to page four then, sir.
A. Uh-huh.
Q. Now do you see the paragraph that starts, "The majority of the conferees would go even further and accept the proposition that nicotine is the active constituent of cigarette

smoke. Without nicotine, the argument goes, there would be no smoking. Some strong evidence can be marshalled to support this argument." See that?
A. Yes, I do.
Q. Now do you know if the scientists who were gathered on San Martin were provided with all the internal documents of the defendant manufacturing companies?
A. Sir, I have no idea.
Q. Now Dr. Dunn reports, "No one has ever become a cigarette smoker by smoking cigarettes without nicotine." Do you see that?
A. Yes, I do.
Q. "Most of the physiological responses to inhaled smoke have been shown to be nicotine-related." Do you see that?
A. Yes, I do. That's what it says.
Q. Now you mentioned the other day that Philip Morris had had a cigarette that had .01 milligrams of nicotine, correct?
A. I think that's what it had, yes.
Q. And it was a flop, wasn't it?
A. It did not succeed.
Q. And when it first came out people bought it, though, didn't they?
A. I think people bought it and tried it. It was in test market.
Q. And if you go down to number three there --
A. Yes.
Q. – "Despite many low nicotine brand entries into the marketplace, none of them have captured a substantial segment of the market. In fact, critics of the industry would be well to reflect upon the indifference of the consumer to the industry's efforts to sell low delivery brands. 94 percent of the cigarettes sold in the U.S. deliver more than 1 milligram of nicotine. *98.5* percent deliver more than .9 milligrams. The physiological response to nicotine can readily be elicited by cigarettes delivering ii the range of 1 milligram of nicotine." Do you see that, sir?
A. Yes, that's what it says.
Q. Now have you ever discussed with your scientists whether they desigued the cigarettes so that there would be a threshold value of

nicotine in those cigarettes?
A. No, we've never -- I've never discussed that, and I don't think we've ever done that. But I can say --
When was this, sir, back in 19 --
Q. 1972.
A. Right.
Q. And you've answered my question, sir.
A. I did want to make a comment.
Q. Well again -- and I'm not allowed to comment, but I would point out, sir, that your lawyer will have a chance to ask you any questions he wants to.
A. Thank you.
Q. All right?
If you go on to the next page then, I want to know if you agree with this statement: "Why then is there not a market for nicotine per se, to be eaten, sucked, drunk, injected, inserted or inhaled as a pure aerosol? The answer, and I feel quite strongly about this, is that the cigarette is in fact among the most awe- inspiring examples of the ingenuity of man." Would you agree with that?
*4 A. Well that's what it says. I don't know that I would agree with it.
Q. Okay. Do you disagree with that?
A. Do I disagree with it, that it's one of the most awe-inspiring examples of the ingenuity of man? I disagree with that.
Q. Okay. The next statement says, "The cigarette should be conceived not as a product but as a package. The product is nicotine." Do you agree with that?
A. No, I don't agree with that. I believe the product is a cigarette.
Q. Now if you go further, "Think of the cigarette pack as a storage container for a day's supply of nicotine." Do you see that?
A. Yes, I do.
Q. And then Dr. Dunn goes on and states why that is. He gives two reasons, correct?
A. Yes, he does.
Q. Then he says, "Think of the cigarette as a dispenser for a

dose unit of nicotine." Do you see that?
A. Yes, I see that. That's what it says.
Q. And then he goes on and states the reasons for that, correct?
A. Yes, he gives threes reasons.
Q. Okay. And what he's talking about here is a drug-delivery device, isn't he?
A. Well I don't know if I'd call it that, sir. He's describing a cigarette, I think.
Q. And he's describing it in terms of a drug-delivery device, wouldn't you agree?
A. Well no, I would probably argue with that.
Q. Okay. Let's go on to the next page.
"Think of a puff of smoke as the vehicle of nicotine." Do you see that?
A. Yes, I do.
Q. And then next, "The smoker has wide latitude in further calibrations: puff volume, puff interval, depth and duration of inhalation. We have recorded wide variability in intake among smokers. Among a group of pack-a-day smokers, some will take in less than the average half-pack smoker, some will take in more than the average two-pack-a-day smoker." Do you see that?
A. Yes, I do.
Q. Now would you agree that what is being described there is the self-administration of nicotine?
A. No, I wouldn't. I would simply say that smokers smoke cigarettes in different ways.
Q. So you just wouldn't agree with the character -- caricature or description of the cigarette as a drug-delivery device, correct?
A. I disagree with that, yes.
Q. Let's go back, then, to Exhibit -- strike that.
Let me ask you one other thing. Do you know if this document was provided to the Surgeon General?
A. No, I don't know that, sir.
Q. Was it provided to the FDA?
A. I don't know. I don't know. I wasn't here in 1970.
Q. Was the previous document we looked at from Dr.

Seligman, which went to the -- excuse me, Dr. Osdene, which went to Dr. Seligman and the directors, provided to the FDA?
A. No, I don't know that either, sir.
Q. Can we then go to Exhibit 11559 , which is one that we looked at briefly this morning. You recall that's the one that dealt with TABLE?
A. Well would you let me get to it?
Q. Sure.
A. I'll see if I can recall it.
Yes, I have it.
Q. Okay. And that's by Ms. Reuter, correct?
*5 A. Yes, that's correct.
Q. And you recall we discussed that briefly this morning.
A. Yes.
Q. Now Dr. Dunn, he was in the research and development department, correct?
A. Yes.
Q. Now if we go to the first page, you'll recall we discussed that this morning, that dealt with the issues of cocaine and morphine and atropine and getting to the brain in eight to 10 seconds. Do you recall that testimony?
A. Yes, I remember the part about cocaine, quinine, morphine, yes.
Q. Okay. And if you go to the next page, Ms. Reuter also describes the cigarette as a nicotine-delivery device, doesn't she?
A. Yes, she does.
Q. "Nicotine delivery devices range from snuff~, chewing tobacco, cigars, pipes and conventional cigarettes to unique smoking articles,
chewing gum, patches, aerosol sprays and inhalers."
Correct?
A. Yes, that's what she says.
Q. Now, do you understand what a competitive analysis is?
A. It would depend upon the context, sir, but it – I would have thought that in general terms you would be looking at what your competitors
are doing.

Q. And you're looking at what your competitors are doing in order to determine whether or not you might want to be in competition with them, correct?
A. That would be a fair analysis, yes.
Q. One of the reasons to do that is you'd want to protect your markets, correct?
A. Your markets, yes. You might want to grow your market share.
Q. You might want to grow your market share, correct?
A. Correct.
Q. And the reason you want to do that is you want to develop revenue or enhanced revenue, correct?
A. Yes. That's one of my jobs.
Q. And in order --
And you want to do that in order to generate profits, correct?
A. Correct, sir, uh-huh.
Q. And in doing so, you want to make a safe product, correct?
A. I'd like to, yes.
Q. Well you want to, don't you?
A. I'd like to, yes, sir.
Q. Is there a difference to you between liking to and wanting to?
A. Oh, I don't see any difference, no.
Q. Now this is a competitive analysis, isn't it, sir?
A. Well let me look at it, sir.
Q. Why don't you just look at the first page under the word "TABLE".
A. Yes, that's what it's titled.
Q. Okay. Then if we go back to the page one, it says "COMPETITIVE ANALYSIS" at the top, doesn't it?
A. It does.
Q. And then the page we were on that's on the overhead right now, it says "COMPETITIVE ANALYSIS," correct?
A. It does.
Q. Indeed, if you look all the way through the first part of this document, it all says "COMPETITIVE ANALYSIS," doesn't it?
A. That's what it's titled, yes.

Q. And on the front page it shows that the competitive analysis is the first part of the document, then organization is the second part, and the production part of it will follow, correct?
A. That's what it says.
Q. Now if we go back to the page we were on, you'll see that Ms. Reuter sets forth the nicotine-delivery devices, the major producers, the target market, and the motivation, correct?
*6 A. Yes, those are the headings.
Q. And under "Cigarettes," the motivation is "nicotine and smoking pleasure," correct?
A. That's correct. That's what it says.
Q. And this was being prepared for management, wasn't it, sir?
A. Yes, I think that's a fair --
Well I don't know, actually.
Q. Well-
A. It doesn't say to whom it was addressed.
Q. Competitive analyses are prepared for management, are they not?
A. Well not necessarily. You could be doing it for yourself. But I don't know who she prepared it for, frankly.
Q. If you go back, then, to the page we were on, which bears the Bates number 666.
A. Yes.
Q. Each one of those nicotine-delivery devices, including cigarettes, sets forth the major producers, the motivations and the target, isn't that
right?
A. We have major producers, motivation, target, yes.
Q. Okay. And if you go on to the next page we will see that Ms. Reuter goes through a number of the other nicotine-delivery devices, correct?
A. As she describes them, yes.
Q. And many of them deal with, on that page, smoking cessation and nicotine reduction, don't they?
A. Yes.
Q. In fact, every single one on that page deals with that, correct?

A. Well I don't think that's quite accurate, sir.
Q. Well they all have either reduction or smoking cessation in the motivation for them' correct?
A. One or the other, yes.
Q. Yes. And we see that in the target market, it's basically for men and women smokers or former smokers or quitters, fair?
A. Yes, that's fair.
Q. And if we go on to the next page, sir, we look at the market size of the competitive products, correct?
A. Yes, that's the title.
Q. And cigarettes are by far the largest at 45 billion dollars, correct?
A. Yes, that's correct.
Q. And that's in 1991.
A. Yes, that's correct.
Q. And then there's an estimated 1992 nicotine patch prescription sales, correct?
A. Yes, that's correct.
Q. Now if we look down at the bottom, then, there's a report, narrative report by Ms. Reuter regarding those competitive products, correct?
A. Well could I just read it to see what --
Q. Certainly. Certainly.
A. So how did you describe this?
Q. This is the "Competitive Products-Recent Trends" as stated by Ms. Reuter, correct?
A. Yes, that's a fair summary.
Q. And she reports here that in the last five years, the scientific community in both the United States and Europe had been pursuing innovative nicotine delivery systems to either replace or transform the worldwide cigarette business as Philip Morris knows it, correct?
A. As we know it, yes, that's what she says.
Q. And she talks about the majority of the patent activity has been focused on transdermal and nasal delivery systems, although more recent
work has moved into tablets and injectable nicotine, correct?
A. That's what it says, yes.

Q. And she points out that the primary motivation for the products is smoking cessation through a controlled, gradual reduction in nicotine delivery, correct?
*7 A. That's what it says, yes.
Q. Now when someone is addicted, do you know if doctors prescribe for them serially-reducing products of the addictive substance?
A. I don't know that.
Q. Never heard that.
A. No, I've not heard that. I don't know how it works.
Q. Have you had any discussion regarding nicotine patches at the board of Philip Morris?
A. Not to my knowledge, no.
Q. Never.
A. Not to my knowledge ever.
Q. Have you had any discussion about nicotine patches and competitive products for cigarettes with any of your managers?
A. I don't recall any at all, sir, no.
Q. Now Ms. Reuter, in this part of the report, goes on to state that there are barriers that have characterized the tobacco business, correct?
A. Barriers to entry.
Q. Barriers to entry. And that means barriers to entry to the market, correct?
A. I'd have thought so.
Q. And the cigarette industry is known as an oligopoly, correct?
A. I didn't know it was known as an oligopoly.
Q. Well it's --
At least it's referred to that by Ms. Reuter.
A. It's referred to her --
Q. "Oligopolistic" --
A. Yes, she --
Q. -- "tobacco industry."
A. She refers to that in that -- in that -- in those words, yes.
Q. That means that there are very few providers of the product in the market, doesn't it?
A. That's what it means. That isn't the case in the tobacco

industry, though, sir.
Q. That's what it means, isn't it, sir?
A. An oligopoly?
Q. Yes.
A. That would mean a few number.
Q. And in the United States, what percentage does Philip Morris have of the domestic cigarette market?
A. Are you talking today or back when --
Q. Today.
A. Today? We have about 48 percent, I think.
Q. Forty-eight percent.
A. Uh-huh.
Q. And in 1992--
A. Uh-huh.
Q. -- what did you have?
A. Well it -- it would be --
This is a bit of a guess, but around 42, I'd say.
Q. Forty-two.
A. Hmm.
Q. And what did RJR have at that time?
A. Oh, I'd say about -- again a bit of a guess, but around 32.
Q. Thirty-two.
A. Uh-huh.
Q. So between the two of you in 1992, you had about 70 percent of the market.
A. That would be roughly.
Q. Who was third at that time?
A. Well it would be fairly close. Probably Brown & Williamson.
Q. And what did they have, sir?
A. Oh, I don't recall. My sense would be 14 or something like that.
Q. Fourteen percent.
A. Uh-huh.
Q. So now we're up to 88 percent.
A. Yes.
Q. Who was next?
A. There would be Lorillard and American Brands, I guess. And then --

Q. They had the balance of the market?
A. No. Then the Liggett & Myers, and then there are a number of Importers.
Q. Okay. What did American have?
A. I don't recall.
Q. But we do know that the top three had 88 percent of the market.
A. It would be in that area, yes.
Q. Now today you said Philip Morris has approximately 48 percent of the market, correct?
*8 A. That's right.
Q. And what does RJIR have today?
A. I'd say about 25 percent.
Q. And is Brown & Williamson still the third largest?
A. Yes, it is.
Q. And what do they have?
A. I'd say about 16, 17 percent.
Q. Okay. So the top three now have about 80 percent, is that right?
A. Yes. But I should tell you that about two years ago Brown & Williamson acquired one of the other companies.
Q. Okay. That would be American, correct?
A. That's right.
Q. Now Ms. Reuter puts out here that "In addition, the nature of competitive product development relies on legal protections afforded the technological innovation" --
A. Could you refer me to that, please, sir?
Q. Sure. It's right at the bottom, sir.
A. Of page four?
Q. Yes.
A. I'm sorry, I can't find it. Will you tell me which page?
Q. The last paragraph, page four, second sentence. "In addition" --
A. Oh, yes, I see it. I'm sorry.
Q. Do you know what she's referring to there?
A. No, I don't know what she's referring to.
Q. Were the competitive products regulated by the FDA?
A. I don't know.
Q. Do you know if patches are regulated?

A. No, I don't know.
Q. Do you know if aerosol sprays or inhalers are regulated in any way?
A. Which type of aerosol?
Q. Any type.
Nicotine aerosol. I'm sorry.
A. I didn't know that there are any.
Q. Okay. Can you direct your attention, then, to the next page where Ms. Reuter goes into the competitive analysis. Now do you remember this morning when I first asked you about TABLE, you weren't familiar with it?
A. Right.
Q. But you said you'd come out with a new product -- or you were about ready to test market a new product?
A. Yes. We have a new product that's in consumer home testing, yes.
Q. And that's a product that is intended to supplement the cigarette business?
A. I don't know what you mean by "supplement." It would be a product in our tobacco business, yes.
Q. Is the tobacco heated or burned?
A. I described it this morning as tobacco being heated.
Q. Heated.
A. Heated, yes.
Q. What's the name of the product?
A. Accord.
Q. Do you know if Accord came from the TABLE project?
A. TABLE project?
Q. Yes.
A. I don't know, sir.
Q. All right. If you look at the competitive analysis, in the very first part do you see where the Premier cigarette is referred to, the one
put out by RIR in 1987?
A. Yes.
Q. And it's described there, is it not?
A. Yes, it is.
Q. And Ms. Reuter states that "In fact, only one domestic company has attempted to commercialize a new type of

nicotine delivery device," correct?
A. Yes, that's what she says.
Q. And it looked like a cigarette, but it consisted of a carbon heat source, a reservoir of nicotine and glycerol, and aluminum oxide pellets
and a wealthy efficient filter system. Do you see that?
A. Yes, I do.
Q. And it was offered in two test markets and didn't do well and was closed in early 89, correct?
*9 A. Yes, that's what it says.
Q. But it had a number of key attributes, correct?
A. Yes, that's what it says.
Q. Zero biological activity, correct?
A. Right.
Q. And what's zero biological activity?
A. Well I don't know that I'm qualified to describe that.
Q. That means that it wouldn't be cancer-producing, doesn't it, sir?
A. Well I don't know. But if you tell me that's what it means, I'm prepared to accept that.
Q. And no ashes, no minimal -- or minimal sidestream smoke, and limited fire safety problems, is that right?
A. That's what she says.
Q. And then in the next paragraph it's pointed out that RIR, based on its patent activity, maintained a strong commitment to new smoking devices, correct?
A. Well you went a bit quickiy. Could I --
May I read it?
Q. Absolutely, sir.
A. Well yes. What did you --
How did you describe it? Or could I have your question again, please?
Q. Sure.
MR. CIRESI: Could we have the question back, please.
(Record read by the court reporter.)
A. Yes, that's what it says, yes.
Q. And it pointed out that Reynolds was not alone in pursuit of a better cigarette, correct?
A. That's right, it says that.

Q. And it's pointed out in the next paragraph that the pharmaceutical companies are pursuing substitute nicotine-delivery devices in a range of formats, correct?
A. Yes, it does say that.
Q. Now in the very next paragraph, then, it says what Philip Morris has decided to do based on this competitive analysis, doesn't it?
A. Well may I read it?
Q. Sure.
A. Thank you.
Yes, I've read it.
Q. All right. Now it's pointed out in there that Philip Morris had chosen to pursue a nicotine-delivery device that like RJR's Premier, continues the cigarette tradition of sucking on a cylindrical mouthpiece to inhale flavorings and nicotine from a tobacco-based product, correct?
A. That's what it says.
Q. And it says "The approach of heating rather than burning the tobacco produces a cleaner, safer smoking experience,: Correct?
A. That -- that's what it says, yes.
Q. "Known by the code name of Table, the product has the potential to replace the conventional cigarette - in much the same way that cigarettes replaced chewing tobacco over a hundred years ago - as a more socially acceptable form of tobacco use," correct?
A. That's what it says, yes.
Q. And the Accord is that cigarette, isn't it, sir?
A. Well I think probably she's described parts of what Accord is, and this may well have been a paper that was referring to the development of that cigarette.
I should add that I don't believe this lady is skilled in the scientific area at all.
Q. Well let me ask you something. At Philip Morris, do you have employees writing competitive analyses for superiors and people in management who are not skilled?
A. In scientific matters?
Q. Yes.
A. Yes, we do have people who are not skilled in scientific

matters.
Q. And do they utilize the resources available to Philip Morris in writing the competitive analysis?
A. Well they should if they have need to.
Q. Yes. And so if Ms. Reuter had need to utilize scientific resources available at Philip Morris, she would do so in writing this competitive analysis, wouldn't she?
A. Well I'd have thought she should have. I don't know if she did.
Q. But throughout this competitive analysis, which is a Philip Morris document, the cigarette is referred to as a drug- delivery device, isn't it?
A. That was described as a -- I think a nicotine-delivery device.
Q. And as you go through the balance of this document, you'll see that there is a patent search that's been conducted for other nicotine-delivery devices, correct? Starts on the next page. It's called "PATENT SEARCH."
A. Yes. I don't know that it covers exclusively nicotine though.
Q. All right. Well there's a patent search in any event, correct?
A. That's quite right, yes.
Q. And you know that patent searches are utilized to determine what the competition might be doing, correct?
A. Yes, I do.
Q. And if the competition was trying to find a safe way to deliver nicotine, Philip Morris would want to know that, wouldn't they?
A. Yes, we would want to know that.
Q. And in fact that's what Ms. Reuter was doing here, wasn't she?
A. I don't know what she was doing, actually.
Q. Have you ever seen a document in Philip Morris that said, "Ms. Reuter, we don't call cigarettes nicotine-delivery devices here because they're not nicotine-delivery devices?"
A. No, I've not seen one.
Q. Okay. Do you know if this document was provided to the

FDA?
A. I -- I -- I don't know. It may well have been, but I don't know.
Q. Do you know if it was provided to the Surgeon General?
A. I don't know.
Q. Isn't it a fact the first time it was made public by Philip Morris was last Friday?
A. Well I don't know that either.
Q. Okay.
A. If it was amongst those documents, it would have been made public last Friday, but I don't know if that was the first time or not.
Q. If I represent to you, sir, that this was a document that was produced in the Minnesota litigation since 1994, would it be fair to assume that the first time Philip Morris released it to the public was last Friday when they put it on the Internet?
A. It may be.
Q. Now other scientists at Philip Morris have called the cigarette a potent pharmacological device, have they not?
A. I've not heard that.
Q. Pardon me?
A. I don't think I've heard that.
Q. Can you direct your attention to Exhibit 10523.
A. Yes, I have that.
Q. Now this is a document that's in evidence, it's a handwritten note by Dr. Charles to Dr. Osdene. These were individuals that you know to be in your research and development department?
A. Yes, they are.
Q. And Dr. Charles was the manager of the biochemistry group, vice-president of research?
*11 A. I don't know what his title was.
Q. You know that Dr. Osdene was director of research, don't you?
A. No, I don't know that. But I -- I know that they were both prominent in the research and development area.
Q. And do you see the date up there, it's December -- or excuse me, February 23rd, 1982?

A. Well I -- I can't read that. It could be 82. It's quite hard to read. But I -- I -- I won't dispute it.
Q. All right. Let me see if I can help you, sir, because I understand it's difficult to read.
A. Oh here, further down there's a reference to 82.
Q. Okay. And this is the form in which the document was produced by Philip Morris. Do you understand that?
A. Yes, I believe you.
Q. Okay. On February --
Well let me back up. "Comments on Future Strategies for the Changing Cigarette,' National Conference on Smoking and Health." Do you see that?
A. Yes.
Q. "On February 22nd, 1982 (the day of the 1982 Surgeon General's press conference on Smoking and Health) you asked me to review the subject document and provide you with comments. The comments below are those of a concerned employee with a 20-year association with PM R&D, of which the past 10 years have been directly involved with smoking and health related research. I consider myself well trained in the biological and chemical sciences and qualified to make the following comments which would be --which should be taken as constructive criticism with suggestions as to how to approach the solution to some of the problems. You may shred this document, have it typed as is, incorporate the suggestion in a position paper for upper management or use the document in any way you see fit." Now sir, let me read one more part before we go on. "This company is in trouble. The cigarette industry is in trouble. If we are to survive as a viable commercial enterprise we must act now to develop responses to smoking and health allegations from both the private and the government sectors." Do you see that?
A. Yes, I do.
Q. Now Dr. Charles was a long-time employee of Philip Morris, was he not?
A. Well I don't know how long he was there, but I do remember him being around. Probably -- well he was there when I first came to the United

States, and that's about 15 years ago.
Q. Okay. At least in 1982 he says he had already been there 20 years, correct, sir?
A. Uh-huh.
Q. And how long after 1982 did he stay there?
A. Oh, I did --
I can't quite tell you that exactly. I would say four or five years ago that he left.
Q. Four or five years ago?
A. Three or four years ago, something like that.
Q. So 1994.
A. Could be. I may have that wrong by a couple of years.
Q. Can you direct your attention to the last page.
A. Yes.
Q. I'm sorry, page four, which is the second-to-the-last page.
A. Right, uh-huh.
Q. Down towards the bottom he says, "Let's face the facts," doesn't he?
A. Yes, that's what it says.
Q. "Cigarette smoke is" --and he underscores is"-- "biologically active." Correct?
*12 A. Yes.
Q. That means it affects human beings in a biological fashion, correct?
A. Well I would think that's right. iih-huh.
Q. And he says, "A. Nicotine is a potent pharmacological agent. Every toxicologist, physiologist, medical doctor and most chemists know that.
It's not a secret." Do you see that?
A. Yes, I do.
Q. Okay. He uses the word "potent," correct?
A. Yes, he describes it as such.
Q. He doesn't say it's a mild pharmacological agent, does he?
A. No.
Q. And he wrote this at a time where it wasn't intended to be used in litigation as far as you know, correct?
A. I don't know why he wrote it.
Q. You don't. Well we know one reason he wrote it is

because his superior, Dr. Osdene, asked him to review the Surgeon General's press
conference on smoking and health. That's right on the first page, correct?
A. Yes, that's what he says.
Q. Okay. And if we go back, then, to page four, - -
A. Uh-huh.
Q. -- "Cigarette smoke condensate applied to the backs of mice causes tumors." Is that right?
A. That's what it says, yes.
Q. That's another fact he wants the company to face, correct?
A. Yes. That's how it's described.
Q. Another thing he says is "Hydrogen cyanide is a potent inhibitor of cytochrome oxidase - a crucial enzyme in the energy metabolism of all cells." Do you see that?
A. Yes, that's what it says.
Q. And that means it affects the enzymatic action of cells, correct?
A. Well I presume so. I -- I really can't comment on that.
Q. Do you know if it's in the cells where malignancy develops?
A. Yes, I understand that.
Q. Did Philip Morris in 1982 provide this type of information to the Surgeon General?
A. I don't know, sir. I wasn't here in 1982.
Q. Do you know if this is another document that was produced in the Minnesota litigation?
A. I don't know.
Q. Do you know if for the first time you disclosed this to the world on the Internet last Friday?
A. Well I don't know that, sir.
Q. If it was produced in the Minnesota litigation and it was one of the Minnesota select documents, then it would have been on the Internet last
Friday, correct?
A. I believe so, yes.
Q. You made the decision to do that, didn't you, sir?
A. Yes, I did, sir. I was one of the people that made the decision to do that.

Q. You said, "Get the documents on the Internet," correct?
A. I said we would put the documents on the Internet, yes.
Q. Now in 1988 the Surgeon General, as you said, found that nicotine was addictive, correct?
A. Yes, that's my recollection.
Q. And he compared it to cocaine, didn't he?
A. That's my recollection.
Q. Just as we saw in the TABLE document, correct?
A. Yes, that was also correct.
Q. Ms. Reuter mentioned cocaine in the TABLE document, didn't she?
A. That's right, yes. As I said, though, she's not a scientist, to the best of my knowledge.
Q. Did scientists work on the Surgeon General's report in 1988?
*13 A. I would expect so.
Q. And sir, can you turn to Exhibit 3820 in volume one.
A. Yes, I have that.
Q. It's entitled "The Health Consequences Of Smoking, NICOTINE ADDICTION, a report of the Surgeon General," correct?
A. Yes.
Q. And if you go to the next page, you'll see the major conclusions, correct?
A. Yes.
Q. "1. Cigarettes and other forms of tobacco are addicting," correct?
A. Yes.
Q. "2. Nicotine is the drug in tobacco that causes addiction." Correct?
A. That's what it says, yes.
Q. "3. The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs
such as heroin and cocaine." Correct?
A. That's what it says, yes.
Q. And there were eminent scientists that participated in the investigation which led to the 1988 Surgeon General's report, correct?

A. I don't know.
Q. Have you ever asked anyone at your company whether there were eminent scientists that contributed to that report?
A. No, I have not.
Q. You do know that Philip Morris did not contribute its internal documents to the Surgeon General in 1988 so the scientists could consider those documents in arriving at their opinion, don't you?
A. Well I don't know that, but I don't think we did.
Q. Well you know that you didn't because the first time all these internal documents got out was last Friday when you made the decision with other people. You just testified to that, didn't you?
A. That they were made public, yes.
Q. Yeah. That's the first time, correct?
A. That they were made public.
Q. Now the reason that Philip Morris didn't want to say that nicotine was a drug is because it felt there would be dangerous FDA implications,
isn't that right?
A. Well that's not my understanding, sir.
Q. Could you turn to Exhibit *10539*. I know this is difficult to read, sir, but it's the best document we got from your company of this document.
Okay? It's entitle "CONFIDENTIAL" at the top, do you see that?
A. Yes, I do.
Q. It's dated February 19th, 1969?
A. Yes.
Q. It's to Dr. Wakeham from Dr. Dunn, correct?
A. Yes.
Q. And it refers to "Jet's Money Offer," correct?
A. That's the subject, yes.
Q. Do you think that's Jett Lincoln?
A. Well I expect so, but I don't know.
Q. And would the money offer be the idea of devoting funds to research and development at Philip Monis?
A. I would not have any idea, sir.
Q. Could you direct your attention to the third paragraph,

and I'll read it for you. "I would be more cautious in using the pharmic-medical model -- do we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous FDA implications to having such conceptualization go beyond these walls." Do you see that?
A. Yes, I do.
Q. And the walls were the walls of Philip Morris, correct?
A. Well I would expect that's what he's meaning, yes.
Q. And the dangerous FDA implications would be that if Philip Morris said we're selling a drug, the FDA would look at regulating it, wouldn't they?
* 14 A. I don't know what he meant when he said that, sir.
Q. It's fair to assume that's what he meant, isn't it, sir?
A. One could assume that, but I don't know what he meant.
Q. Well did Philip Morris ever go to the FDA at any time and say, "We're selling a drug?"
A. Not to my knowledge.
Q. And did Dr. Ellis tell you when you met with her that nicotine had physiological effects?
A. She may have, but I can't remember.
Q. Did she tell you that there were optimum nicotine deliveries for producing the most favorable physiological and behavioral responses?
A. No, I have no memory of ever being told that.
Q. Did she tell you there was a certain dose range for cigarettes --
A. Dose -- dose --
Q. -- with regard to nicotine?
A. Not to my knowledge, no.
Q. Direct your attention to Exhibit 11771, same volume.
A. Yes, I have it.
Q. That's a memo to C. K. Ellis. Is that Dr. Ellis?
A. Yes, that is Dr. Ellis.
Q. And again, she's a chemist, is that correct?
A. She's a pharmacologist, I believe, sir.
Q. Pharmacologist. Chemical degree?
A. I don't know. I forgotten what her undergraduate degree is. But she's a -- she has a Ph.D. in pharmacology.
Q. All right. And the date of this is November 8th, 1990,

correct?
A. Yes, that's right.
Q. Do you know who Mr. Gullotta is?
A. No. I've heard his name.
Q. He's a research and development scientist, is he not?
A. Yes, I believe that's right. He's in the research department at least, I know that.
Q. And the subject here is "Raison d'etre," correct?
A. Raison d'etre.
Q. Raison d'etre. Okay. That means the reason for being?
A. The reason to be, uh-huh.
Q. Have you seen this document before?
A. No, I've not seen this document before.
Q. Can you go down to paragraph three.
A. Uh-huh.
Q. Does it appear to you that Dr. Ellis was told by the three scientists who are listed, on or about November 8th, 1990, that "We have shown that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses?~
A. Yes, that's what it says.
Q. Did she tell you that before you testified in Congress?
A. No, I don't remember being told that.
Q. Are you sure?
A. Well I'm pretty sure I don't remember being told that, yes.
Q. You are sure you didn't tell Congress that Philip Morris knew that there were optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral effects.
A. No, I never told anybody that because I've never known about that.
Q. Did she tell you that your laboratories have demonstrated that all forms of nicotine are not behaviorally or physiologically equal? This observation is important for evaluating research cigarettes where the addition of nicotine is necessary? Did she tell you that?
A. No, I've never heard that.
Q. Now we saw the other document earlier today talking

about the form of nicotine, didn't we?
*15 Q. Yes. I found that a very complicated document. I couldn't understand it.
Q. Now Philip Morris has tracked youth over the years, haven't they, in terms of how they smoke?
A. Not to my knowledge.
Q. Have you looked at the documents to determine whether or not that's true or not, sir?
A. No. I wouldn't know where to start, sir. As I said, when I got my job, I decided I could spend the rest of my life looking backwards, I decided to look forward, sir.
Q. Well you wouldn't know where to start. You would just ask your people, "I want to know what documents are in our files that either suggest or negate whether we marketed to youth." You could ask that question, couldn't you?
A. Well sir, let me say this: In all the years I've worked with Philip Morris, I have never heard anybody talk about marketing to youth, nor have I ever heard anybody suggest that we should, so it wouldn't occur to me to ask whether we had done so. But then I've seen quite a bit of press about it, and I've asked people, and none of-- none of them have ever said to me that we've done that.
Q. I don't mean any disrespect by this, but do you have a policy of plausible deniability at Philip Morris?
A. Of which deniability?
Q. Plausible deniability.
A. I don't know what you mean by that.
Q. Well that would mean that we don't show somebody something so then he or she can deny it even though it may be true.
A. No, I reject that, sir. I have the utmost faith in the integrity of the people who work at Philip Morris. I'm very proud of them.
Q. So that they should show you everything, correct?
A. If they thought it was important. I don't know that they should show it to me. They would show it to their superior.
Q. And you are the ultimate superior, correct?
A. In the end. And then it would be up to people to determine what I should see. That I rely on that.

Q. And your company, together with the rest of the industry, has been accused of killing over 400,000 people a year, correct?
A. I think I'd put it another way, I'd say people have suggested that number of people die from smoking cigarettes.
Q. Okay. Now therefore, having that in mind, you could demand any research that is within any file cabinet within the entire world of Philip
Morris if you wanted it, couldn't you?
A. Yes. I don't know why I would want to do that because I wouldn't know what -- how to start to deal with it. It would take me thousands of
years, probably, to read them.
Q. Well it didn't take thousands of years to turn over all the documents in this litigation, did it?
A. The documents you're talking about?
Q. Yes.
A. It was an enormous effort, sir, by, I think, some 600 people or 700 people.
Q. Seven hundred people.
A. Hmm.
Q. Working how long?
A. Well I don't know exactly, but probably about nine months or a year.
Q. Nine months or a year, 700 people gathering the documents to turn over in this lawsuit, correct?
* 16 A. That's what I remember.
Q. Now let's assume that somebody at Philip Morris had asked for those documents 20 years ago, a CEO of Philip Morris. Okay?
A. You're asking me to assume that?
Q. Yes.
A. Yes.
Q. It wouldn't have taken any longer at that time because more documents were generated in the intervening period, correct?
A. I'm not sure what you mean. It wouldn't take any longer than what, sir?

Q. It wouldn't have taken any more than 700 people working nine months to gather the documents 20 years ago, would it?
A. Well I would have thought it would have, today you have better photocopying machines and probably more technical tools available. But I'm not going to argue over it.
Q. Okay. And do you know how many people have started smoking in those 20 years?
A. No, I don't, sir.
Q. Do you know how many children have started smoking in those 20 years?
A. No, I don't.
Q. Do you know how many young teen-agers have started smoking in those 20 years?
A. No, I don't have any idea.
Q. Do you know how many of those teen-agers who started smoking became addicted?
A. No, I have no idea, sir, as I told you, how many even started smoking, if any.
Q. Do you know how many people in those 20 years who smoked developed lung cancer?
A. No, I don't know that, sir.
Q. Do you know how many people in those 20 years have developed chronic obstructive pulmonary disease?
A. No, I don't, sir.
Q. Do you know how many people in those 20 years developed coronary heart disease?
A. (Coughing) Excuse me.
No, I don't.
Q. Now with regard to youth, sir, do you know what percentage of your market is less than 18 years old?
A. No, I have no idea.
Q. You've never asked.
A. I beg your pardon?
Q. You've never asked.
A. I've never asked because nobody would know. We don't conduct any surveys of under-age people.
Q. You never have done that, correct?
A. Not to my knowledge. I watched the deposition of Jim Morgan and I saw some documents produced there, and that

is the extent of my knowledge.
Q. Well you saw in that deposition that documents showed that Philip Morris was tracking youth, correct?
A. If I remember correctly as Jim defined that, he -- I think it was somebody gathering information from public sources.
Q. Do you know what percentage of smokers start before the age of 18?
A. No, I don't know.
Q. Let's assume that -- take a conservative number and say it's 69 percent. All right?
A. Yes.
Q. What happens --
What would happen to your company if you didn't have 69 percent of the smokers?
A. Of which smokers?
Q. Of your smokers.
A. Could you explain to me your point, please? I'm not -- I don't quite understand --
Q. Sure.
A. -- the sense of it. What would happen to our company if 69 percent of young smokers didn't smoke?
Q. No.
A. Oh.
Q. Sixty-nine percent of all smokers didn't smoke. What would happen to your company?
*17 A. Well I would expect that we would sell 69 percent less cigarettes.
Q. A lot less, right?
A. A lot less, yes.
Q. Be a lot smaller company, wouldn't it?
A. Yes, if that's the case. But --
Q. A lot less profit, correct?
A. Uh-huh, yes.
Q. Wouldn't be the 6.7 billion cash flow, would there, in your corporation?
A. I believe less.
Q. Less. Be much less, correct?
A. It would be. We have a number of other companies, sir.
Q. But none as profitable as tobacco, sir.

A. Not quite. Nearly as.
Q. Yes.
A. Nearly as.
Q. And you'll recall yesterday we talked that the companies started with tobacco and grew from there, didn't we?
Q. Yes, that's right.
Q. Now do you know if your board of directors received briefings on 16-year-old smokers?
A. I don't know, sir. Certainly not under my watch.
Q. Well do you know if they did under Mr. Culiman's watch, who's still on your board, and I -- strike that. He's not on your board. I misspoke.
Still attends board meetings, correct?
A. He attends some board meetings, yes.
Q. Okay. Do you know if it happened on his watch?
A. I don't know.
Q. Can you direct your attention, sir, to Exhibit 10497.
A. Yes, I have that.
Q. Now this is entitled "A Study Of Smoking Habits Among Young Smokers," correct?
A. Yes, that's correct.
Q. And it's prepared for Philip Morris Incorporated, July 1974, correct?
A. Yes, that's what it says.
Q. And it's prepared by the Roper Organization, correct?
A. Correct.
Q. And can you turn to the first page.
A. Yes.
Q. Have you ever seen this document before, sir?
A. No, I have no memory of seeing this, sir.
Q. And do you see what the purpose of the study is?
A. Yes, it says it is to -- "The purpose of this study among young smokers age 24 and younger was to gain insights as to what is happening with regard to brand preferences....
Q. "...and images of cigarette brands in that segment of the population," correct?
A. Yes, that's correct.
Q. Okay. And it says that "Philip Morris has evidence that there has been a rapid trend to menthols -- and to Kools in

particular -- among young
smokers," correct?
A. That's what it says, yes.
Q. And the study was designed to explore the following major questions, correct?
A. Yes.
Q. And one of those questions was what was happening in the young market with regard to Marlboro to n/in and menthols, correct?
A. Yes.
Q. What's n/in, sir?
A. Well I don't know, but I think it's probably safe to say it's nonmenthol.
Q. Number two, in what segments of the age spectrum are Marlboro non-menthol and menthols most popular, correct?
A. Yes, correct.
Q. Three, "Are young people starting with menthols or is there mass switching at some point?" Do you see that?
A. Yes.
Q. And starter smokers, sir, those are people who have never smoked before, correct?
A. Yes, I think that's a fair definition.
* 18Q. And is it your testimony you don't know that the vast majority of people who start smoking start smoking before the age of 18, is that
your testimony?
A. Well I don't know, but I've read that most smokers start before they're 18 years of age. I've read that.
Q. About 80 percent?
A. That's what I've read.
Q. Large segment of smokers, correct, sir?
A. What is a large segment, sir?
Q. Eighty percent.
A. Eighty percent is a large segment of a group, uh-huh.
Q. Then the next question that was being looked at was whether smoking patterns were different among young blacks and how much more popular are
menthols among young blacks, correct?
A. Yes, that's what it says.

Q. And fifth, "Do more whites smoke menthols when some of their friends are black than when few or none of their friends are black," is that correct?
A. Yes, that's what it says.
Q. And six, "Is there recognition among young people that menthols are growing in popularity?" Do you see that?
A. Yes, I do.
Q. Okay. Then the next paragraph shows how the study was conducted, doesn't it?
A. Well that's what it's described as. I haven't read it.
Q. "The study was not designed to be a large scale study projectable to the population, but aimed rather at covering the under 24 age group with inclusion of as many important segments of that group as possible. 1,050 interviews were conducted among young smokers." Do you see that?
A. Yes.
Q. So the Roper Organization was actually going out and interviewing people in this age bracket to ask them about the questions that are in the
section of the study which is entitled "Purpose of the Study," correct?
A. Well I don't know what the age bracket is, sir, that you refer to.
Q. Under 24.
A. Yes.
Q. "A sample was drawn of 35 locations around the country...." Correct?
A.Yes.
Q. "...with locations roughly apportioned by the four major geographic areas and by size of place," correct?
A. Yes.
Q. And on the next page we see that the interviewers were assigued quotas for sex and race of young smokers to insure adequate numbers of
whites, blacks, males and females, correct?
A. Yes.
Q. And the interviewers were instructed to go to locations where young people, as described in their quota assignments, were likely to be found,

correct?
A. Well I don't see that.
Q. Well it's right in that paragraph. Move down toward the -- toward the end of it.
A. Yes, I do see that.
Q. Near high schools and colleges, correct?
A. Yes. It says to be found near high schools and colleges. Yes, you're right.
Q. You find young people under the age of 18 in high schools, don't you?
A. I'd certainly expect to, yes.
Q. You find them at soda fountains, don't you?
A. Well I would have thought so. I'm not that familiar with it.
Q. You'd find them at recreation areas, don't you?
A. I would have thought so.
Q. You find them in parks, don't you?
* 19 A. Yes, I would have thought so.
Q. You find them in bowling alleys and beaches and lakes, don't you?
A. Yes, I think that's fair.
Q. Now this was a study conducted for and on behalf of the Philip Morris Company in 1974, wasn't it, sir?
A. Yes. But I would point out that it's for the under-24 population.
Q. Well, that can go all the way down to zero, can't it?
A. It certainly can, but it doesn't say that it does.
Q. Find a lot of 24- and 25-year-olds, 23-, 22-, hanging around high schools?
A. No. No. But you may find those people hanging around the other areas, but I take your point.
Q. And the point is: Young teen-agers are in all of those locations, correct, Mr. Bible?
A. Well I don't know, but I -- I'm not that familiar with some of those locations, but I think that's a fair assumption, sir.
Q. Now do you know how much Philip Morris spent between 1983 and 1994 on advertising, marketing and promotion?
A. No, I have no idea.

Q. Do you know how much it spent on youth prevention?
A. No.
Q. If I told you that Philip Morris spent *15,914,336,845* dollars on advertising, marketing and promotion from 1983 to 1984 - - or 94, would that surprise you?
A. From 1984 to 1990 --
Q. 1983 to 1994.
A. In the domestic cigarette companies?
Q. That's correct.
A. How many billion dollars?
Q. Fifteen billion nine hundred fourteen million - -
A. No, that --
I could understand that.
Q. And if you take a look in your book -- we may have an exhibit. Well let me get the board for you, sir, you may not have it there.
MR. CIRESI: May I approach, Your Honor?
Q. Now sir, this comes -- I'll represent to you this comes from information provided by Philip Morris.
MR. BLEAKLEY: Your Honor, may I go around?
Q. It's Exhibit 20177, and it's youth prevention expenditures to advertising, marketing and promotion expenditures, 1983 to 1994. Do you see that, sir?
A. Yes, I see the heading.
Q. Okay. Now over here, and it's represented by the green on this pie chart, --
A. Uh-huh.
Q. -- is the expenditures for advertising, marketing and promotion, *15,914,336,845* dollars. Do you see that?
A. Yes, I do.
Q. Now during that same period of time, based on Philip Morris's documents, Philip Morris spent twenty million eight hundred eighteen million seven hundred forty thousand dollars on youth prevention, do you see that?
A. Yes, I do see that.
Q. And that's partly during your watch, isn't it?
A. Yes, that is right, sir.
Q. So Philip Morris spent, if my calculations are correct -- and I'd ask you to accept them -- one-tenth of one percent on

youth prevention that
it spent on advertising, marketing and promotion, is that right, sir?
A. Well I'd need to do the calculation.
Q. Would you accept that?
A. Well one percent of 15 billion I expect is 159 million. Am II fight?
Q. Yes.
A. And that to me would be about --20 million is one-eighth of that roughly, so I'd say that's about .125.
*20 Q. .125 of one percent.
A. That's what I would say, uh-huh.
Q. On youth prevention, is that right, sir, according to your calculation?
A. Well if the numbers are accurate.
Q. Now can you direct your attention to Exhibit 10299.
A. Yes.
Q. Have you ever seen that before, sir?
A. No, it doesn't ring a chord in my memory, sir.
Q. Now this is a smoker psychology research, correct?
A. That's the title, yes.
Q. And it's by Dr. Wakeham, correct?
A. Yes, that's right.
Q. And it's presented to the board of directors at Philip Morris on November 26, 1989, correct?
A. Right.
Q. Or 1969. Excuse me. Is that right?
A. Thai's correct, yes.
Q. Now that's the highest level of the company, correct?
A. Yes, that's right.
Q. Now certainly they're not provocateurs, are they? Or maybe they are.
A. I wouldn't describe them as that, but quite often they stimulate one's thinking, yes, I can assure you of that.
Q. And they get information from the company's research departments, et cetera, to stimulate their thinking, don't they?
A. Well from time to time we would make a presentation to them, yes.

Q. Presentations are made and conversation is stimulated at the highest levels of the corporation, correct?
A. Can you say that again, please?
Q. Sure.
Information is provided and conversation is stimulated at the highest levels of the corporation.
A. Well I'd have thought that's fair comment, yes. I think that would probably happen in every company.
Q. And at Philip Morris, its company, they stimulated conversation on 16- to 24 -- 20-year-olds, didn't they?
A. I don't believe that to be so, sir.
Q. You don't.
A. No, I don't.
Q. Well why don't you turn to the first page of this document.
A. Yes, I have it.
Q. "Gentlemen of the Board and Guests." Do you see that?
A. Yes.
Q. By the way, in 1969 was Joseph Culiman III on the board?
A. I think he was chairman then, sir.
Q. Chairman.
A. I think he was, yes.
Q. And now he attends as a guest, correct?
A. He's chairman emeritus, yes. He's invited.
Q. And this is from Dr. Wakeham, November 26, 1969. "Once again it is my pleasure to appear before you and to make this traditional annual presentation of Philip Morris Research Center activities." Correct?
A. Yes, that's what it says.
Q. And sir, if you turn to the page which bears the Bates number 749,
A. Yes, I have that.
Q. -- and you see where it says "Slide 13?"
A. Yes.
Q. And he says, "First, we must break the question into two parts: Why does one begin to smoke?" That's a starter, right?
A. Yes.
Q. And two, "Why does one continue to smoke?" Correct?
A. Yes.

Q. Now this appears to be a slide that is being put up on the board to stimulate the conversation, correct?
A. Well it would appear to be a slide put on the board. I don't know why it was there, whether it was to stimulate conversation or not. It might
be to make a point. I don't know, sir.
*21 Q. Well let's see what point was being made if it wasn't to stimulate conversation. The paragraph right after what I just read to you. "There is general agreement on the first part. The 16 to 20- year old begins smoking for psychosocial reasons. The act of smoking is symbolic, it signifies adulthood, he smokes to enhance his image in the eyes of his peers." Correct?
A. Yes, correct.
Q. Sixteen years old, correct?
A. Yes, correct.
Q. Talking to the board of directors, correct?
A. Yes, that's correct, sir.
Q. And where they would --
That's the highest level of this company, isn't it?
A. It is the highest level of this company, yes, the board of directors, yes.
Q. And Dr. Wakeham goes on and says, "But the psychosocial motive is not enough to explain continued smoking," correct?
A. Yes, he says that.
Q. "Some other motive force takes over to make smoking rewarding in its own right," correct?
A. Yes, that's what it says.
Q. "Long after adolescent preoccupation with self-image has subsided, the cigarette will even preempt food in times of scarcity on the smoker's priority list." Do you see that?
A. Yes, I do.
Q. Now does that ring a little bell that that might be addiction?
A. Not to me, sir, no.
Q. Not to you?
A. No, sir, it doesn't.
Q. Does the term "adolescent" ring a bell with regard to the

age we re talking about?
A. Yes, it does, and I'm ashamed of that.
Q. You're ashamed of it.
A. Yes, lam.
Q. And yesterday Mr. Morgan was shocked at it, wasn't he?
A. He said that, yes.
Q. Called it an anomaly, didn't he?
A. Uh-huh, he did.
Q. Is this another anomaly at the highest levels of the corporation, sir?
A. Well I don't know what was happening at that time, sir, but I don't like to see something talking about the company looking at 16-year-olds.
Q. And we don't know if you're talking about that today unless we had some documents to see what you were talking about today, do we?
A. I can tell you categorically today we do not market cigarettes to under- age people.
Q. Well we just have to take your word on that, don't we, sir?
A. I'd like you to take my word on it, sir.
Q. Yes, I know you would. But we don't have any documents to see what you're really talking about at the board, do you?
A. Well I thought you had all of our documents, sir.
Q. No. Documents were cut off.
MR. BLEAKLEY: Objection, Your Honor, objection to the commentary by Mr. Ciresi.
THE COURT: Objection sustained.
BY MR. CIRESI:
Q. Do you know when discovery was cut off in this lawsuit?
A. No, I don't.
MR. BLEAKEBY: Objection, Your Honor, when discovery was cut off is not relevant to this witness's testimony.
THE COURT: Well the date I think is relevant, yes.
Q. I'm just asking about the date, sir.
A. Could you ask the question again, please?
Q. Sure.
Do you know when our discovery of getting your

documents was cut off?
*22 A. No, I don't.
Q. If I represent to you that it was in 1994, would you accept that?
MR. BLEAKLEY: Same objection, Your Honor.
TUE COURT: You may answer that.
A. Well could you ask the question again, please?
Q. Sure.
If I tell you it was in 1994, would you accept that?
A. Yes, I'll accept that.
Q. Thank you.
Now Dr. Wakeham goes on to report on this slide to the board of directors, "One of the obvious ways to approach the problem is to ask the smoker himself why he smokes? When you do this (and Leo Bumett did this about ten years ago for Philip Morris)" --
Do you know who Leo Burnett is?
A. Yes. It's an advertising agency.
Q. Yes. They went out and they asked adolescents why they smoked, didn't they, sir?
MR. BLEARLEY: Objection, Your Honor, that is not what the document says. That's a mischaracterization. It says "smokers."
THE COURT: Well do you understand the question?
A. I was about to say that -- excuse me.
Q. That's all right.
A. I was about to say that's not what it says.
Q. Do you know if Leo Burnett went out and asked adolescents why they started smoking?
A. I don't know that Leo Burnett went out and asked adolescents why they asked -- started smoking, so it's not what this says here.
Q. But what it does say, sir, is that whoever they asked reacted either to an advertising slogan or gave one of two responses, correct?
A. Yes, that's right. "It relaxes me. It stimulates me."
Q. Or they will parrot an advertising slogan, correct?
A. That's right, uh-huh.
Q. And when Dr. --

MR. CIIIRESI: I think I'm losing my microphone, Your Honor.
TUE COURT: Well just so you're not losing your mind. (Laughter.)
MR. CIRESI: I better not respond to that one, Your Honor.
TUE COURT: All right. Do you want to take a recess and regroup?
MR. CIRESI: We may -- I think it's all right now.
THE COURT: Okay. Go ahead.
MR. CIRESI: Now the -- well maybe we should take a recess.
THE COURT: Let's take a recess.
THE CLERK: Court stands in recess. (Recess taken.)
TUE CLERK: All rise. Court is again in session.
(Jury enters the courtroom.)
TIIE CLERK: Please be seated.
TUE COURT: Counsel.
MR. CIRESI: Thank you, Your Honor. BY MR. CIRESI:
Q. Mr. Bible, we're still on Exhibit 10299, Dr. Wakeham's report to the board of directors on November 26th, 1969.
A. Yes.
Q. And we're still on page 749, right?
A. Page --
Q. 749.
A. 749. Thank you.
Q. When the smoker parrots an advertising slogan, that means a slogan used by the tobacco company, correct?
A. I'd expect so, yes.
Q. So that the advertising was having an effect on the smoker, correct?
A. I don't know. I -- I think that's a fair --
Q. Fair assumption, isn't it?
A. Fair assumption.
Q. And Dr. Wakeham then goes on to examine why smokers smoke on the balance of this page and over on to the next page, and he points out differences between smokers and non-smokers, correct?
*23 A. Well I haven't read that yet, sir.
Yes, it says at the outset breaking into two parts, one, why does one

begin to smoke, and two, why does one continue to smoke. We're still on part one, I believe. Is that what you're saying?
Q. Right. Then he goes through behavioral differences between smokers and non-smokers. Smokers have higher accident and injury rate, don't they?
A. Yes, I see that, according -- according to this.
Q. That -- that would result in more medical expenses, wouldn't it, compared to --
A. Yes, I -- I expect so, yes.
Q. Yeah. And there's physiological differences, correct?
A. Yes. That's described here.
Q. Psycological differences, correct?
A. Yes, that's described here.
Q. And then down to "Cigaret Smoke Effects," that's the approach looking at the immediate effects of smoke inhalation upon the smoker, correct?
A. Well I'm not sure who's saying that.
Q. Well it's obviously Dr. Wakeham saying it, isn't it? This is his presentation to the board.
A. Yes, I think that's probably fair, yes.
Q. Okay. "A third way to approach the question is to search for the immediate effects of smoke inhalation upon the smoker."
A. Yes.
Q. "This approach has also been fruitful. Here are the changes in human body function which follow smoke inhalation. All of these changes have been reported by at least two independent researchers." Correct?
A. Yes.
Q. And they're looking at why people continue to smoke, correct?
A. Well why does one begin to smoke and why does one continue to smoke.
Q. Continue to smoke.
A. I just-
Q. Now we're looking at why one continues to smoke, correct?
A. Well I don't know. Does it say that?
Q. Do you know, sir?

A. Does it say that anywhere? I don't know where -- I don't know where he jumped from one to two, frankly.
Q. All right. Do you see the smoke effects in any event?
A. I beg your pardon?
Q. Do you see the smoke effects in any event?
A. At the bottom of this page?
Q. Yes.
A. Yes, I do.
Q. And it goes over to the next page, correct?
A. Yes, it does.
Q. And the two at the top of that page are "Arousal center in brain stem excited," correct?
A. Yes.
Q. And we saw in the TABLE memo reference to brain activity also, didn't we?
Q. Well I don't quite recall that.
Q. Do you recall talking about reactions of the ACH earlier this morning?
A. Of the-
Q. ACH, the neurotransmitters. Do you remember that?
A. I remember we were talking about neurotransmitters, yes.
Q. That's in the brain. Do you know that?
A. Yes, I think I did know that.
Q. And Dr. Wakeham says to the board, "Now what can be said about all of these findings," correct?
A. Yes.
Q. He goes on to the next page, correct?
A. Yes.
Q. And he summarizes with three general observations, correct?
A. Yes.
Q. And then he goes on in the next paragraph talking about whether or not the differences of the people that are attracted to smoking because it acts as a tranquilizer in a stressful situation, or whether it's something else, correct?
*24 A. ". ..as some told Leo Burnett."
Q. And then he states the research and development department's conviction, doesn't he?
A. Well I can't -- I haven't got there. Can you point me to

that, please?
Q. Sure. "We are of the conviction...."
A. Oh, I see, yes, in the next paragraph.
Q. See that?
A. Yes.
Q. "We are of the conviction, in view of the foregoing, that the ultimate explanation for the perpetrated cigarette habit" -
A. "Perpetuated."
Q. "Perpetuated," I'm sorry. And that is talking about why people continue to smoke, correct?
A. Yes.
Q. Okay.
A. I -- I would have thought so, yes.
Q. -- "resides in the pharmacological effect of smoke upon the body of the smoker, the effect being most rewarding to the individual under stress." Do you see that?
A. That's what it says, yes.
Q. And the pharmacological effect, that refers to the drug effect, doesn't it, sir?
A. I'd have thought that's what it means, yes.
Q. So that if we go back to page 749, we see that when we're talking about the adolescent beginning to smoke --
A. Where -- where does it say that, please?
Q. Back on page 749, right by slide 13.
A. Uh-huh.
Q. Remember, we broke the question down into two parts, why does one begin to smoke and why does one continue to smoke, right?
A. Yes. Yes.
Q. And for the 16- to 20-year-old, the act of smoking is symbolic, it signifies adulthood, he smokes to enhance his image in the eyes of his peers, correct?
A. Yes.
Q. Then he goes through why people continue to smoke over the next few pages and he reaches the conclusion that we just saw: They continue to smoke because of the drug effect, correct, sir? That's what the research and development head reported to the board in November of 1969, correct?
A. Can you just point me to that last comment again?

Q. Yes. Page 752.
A. Uh-huh.
Q. "We are of the conviction, in view of the foregoing, that the ultimate explanation for the perpetuated cigarette habit resides in the pharmacological effect of smoke upon the body of the smoker, the effect being most rewarding to the individual under stress." Correct?
A. That's what it says, yes.
Q. That's the drug effect, is that right?
A. Well I really don't know that's exactly what it does mean.
Q. Well "pharmacological" refers to drug, correct, sir?
A. I think that's right, yes.
Q. So if I take out "pharmacologic" and put in "drug," it would be drug effect.
A. Well yes. I don't know the degree, though. That's what I'm challenging on. That's all.
Q. In any event, that's what was told to the board of directors on November 26th, 1969, correct?
A. That -- that's correct, sir, yes.
Q. Teen-agers start smoking because they want to be adults, and then you hook them and they're addicted. That's essentially what's being said
here, correct?
A. Well I wouldn't agree with that.
Q. You wouldn't.
A. No.
*25 Q. Now on the Roper study -- remember, we were talking about that before we talked about this document?
A. Yes, I do remember that.
Q. And you said, you know, 24, that doesn't mean it's younger, and I said well can it go down to zero? Remember that?
A. Yes, I do.
Q. Do you know how young they were interviewing people?
A. No, I don't. I don't that we interviewed people actually.
Q. You don't know that they -- pardon me?
A. I say I don't know that we've interviewed people under-age.
Q. Well will you go back to that Exhibit 10497, the 1974

Roper report to Philip Morris.
A. Uh-huh.
Q. And if you go to the very last page --
A. Yes. Is that *185?*
Q. Yes, it is.
A. Uh-huh.
Q. And if you look in the upper right-hand corner, - -
A. Uh-huh.
Q. -- can you look at number 30?
A. Yes.
Q. "How old do you happen to be?" Correct?
A. That's what it says. I don't know what this is, though. May I have a look?
Q. Well if you want to, you can turn back to Bates number 182 and you'll see that's the beginning of the questionnaire that was used by the
Roper Organization.
A. Well I don't know if that's what was used because nothing's completed.
Q. Well let me see what it says here. It says, "I'm from The Roper Organization and we're conducting a survey around the country." Do you see that at the top?
A. Of? Top of?
Q. Top of page 182.
A. 182.
That's what it says. I think all I'm saying is that there's no indication to me here that this was completed by anybody.
Q. Well sir, if you go through the report, it's a report of the interviews.
A. Well I haven't been through the report.
Q. All right. Well I want you to assume that's what it is. Can you do that?
A. Can I assume that --
Q. That's what it is.
A. That this is --
Q. A report of the interviews that were conducted - -
A. I see.
Q. -- of the over 1,000 people --
A. Uh-huh.

Q. -- by Roper for Philip Morris. Can you assume that?
A. Yes, I can assume that.
Q. Now if you go to the last page of the interview form, "How old do you happen to be?" Where do they stop?
A. Fourteen or younger. Uh-huh.
Q. Fourteen or younger.
A. That's what it says, yes.
Q. Those children were being interviewed in 1974 by Roper on behalf of Philip Morris based on this document, correct, sir?
A. Well I have to agree with you, it does say, "How old do you happen to be?" And that starts at 14 or younger.
Q. And if they were doing that, are you ashamed of that too?
A. Yes. You know, I -- I'd need to study the whole document, but it --
If they were actually conducting a survey of people that age or children that age to do with smoking habits, yes, I'd be ashamed of that.
Q. That's another one you're ashamed of, correct?
A. I beg your pardon?
Q. That's another one that you're ashamed of.
A. I -- yes, I'm very sorry about that.
Q. And would that also be an anomaly, or don't you know?
*26 A. Well I would say it would -- it would be an anomaly. I would say it certainly wouldn't happen today.
Q. Do you know if it was an anomaly up until -- let's -- let's use the day you took over, 1994. Do you know if it was an anomaly up to 1994?
A. Up to 1994--
Q. Yes.
A. --or after 1994?
Q. Up to.
A. Up to 1994. I would say it's an anomaly, yes, because, as I said, I've never ever in my career at Philip Morris ever heard of us ever marketing cigarettes to youth or -- I've never heard or seen of any survey whatsoever.
Q. Are you shocked by these?
A. I am shocked, yes.
Q. And at least you can see from these two that surveys and

interviews were being conducted of children as young as 14 by Philip Morris.
A. It appears to have been the case, done by Roper, yes.
Q. And reports were being made to the board of directors, the highest level of the company, about teen-agers 16 years old, correct?
A. Yes. That was that report we saw.
Q. Now can you turn, sir, to Exhibit 11808. That would be in the second volume. It's right towards the beginning.
A. Yes, I have that.
Q. Now do you remember this document, this was during Mr. Morgan's deposition, you watched it yesterday?
A. I don't-
Q. No, that's not fair, because he was on the overhead and you couldn't see the documents, so I'll withdraw the question.
Do you recall in Mr. Morgan's deposition where he said he was the brand manager in 1979 for Marlboro and he was shown a document on the Philip Morris corporate headquarters letterhead and he was asked whether it was his document, and he just didn't know? Do you remember that?
A. Vaguely I do recall that, yes.
Q. I'll represent to you that this was the document that was up at that time –
A. Uh-huh.
Q. – or that he was looking at. All right?
A. Uh-huh.
Q. Exhibit 11808.
A. Yes.
Q. Now have you seen this document before?
A. No. It doesn't mean anything to me, sir.
Q. Okay. This is a March 29th, 1979 document.
A. Uh-huh.
Q. Correct?
A. Yes.
Q. Five years after the Roper report, correct?
A. Well I'll accept that. I've forgotten the date of that report.
Q. Ten years after the report to the board of directors, correct?

A. Yes, that's correct.
Q. Now it's on the Philip Morris letterhead, 100 Park Avenue, correct?
A. Yes, correct.
Q. And in the first paragraph it says, "Marlboro represents 60 percent of Philip Morris USA sales. The brand accounts for one- third of all growth of Philip Morris USA. In 1978 101 billion units were sold." Correct?
A. Yes, that's what it says.
Q. Now is that in accord with your understanding of where the market was roughly around that time?
A. Oh, I don't remember, sir.
Q. You don't.
A. No. I was not involved in the business then.
Q. And can you direct your attention to "Demographics."
A. Yes.
Q. Remember, you said you didn't think Philip Morris tracked what youth was doing?
*27 A. Right.
Q. Yes. Okay. "Demographics.
"Marlboro dominates in the 17 and younger category, capturing over 50 percent of the market." Do you see that?
A. Yes, I do see that.
Q. That's a report here of Philip Morris showing what percentage of the market Marlboro has of the 17 and younger age category, correct?
A. That's what it says, yes.
Q. And it says that Marlboro Red is the choice of the younger group, correct?
A. It says Marlboro Red is smoked by the younger group.
Q. Okay. And lights by the older group, correct?
A. That's what it says, yes.
Q. And Marlboro Lights are the 18- to 24-year-old group, correct?
A. I'm sorry?
Q. Marlboro Lights were the 18- to 24-year age group, correct?
A. Yes, that -- that would -- that would be right, yes.
Q. And then there's a section down there on advertising. Do

you see that?
A. Yes.
Q. It said, "When Lights were first introduced, it was a management decision that the advertising should be significantly different from Red advertising." Correct?
A. That's what it says, yes.
Q. And the Red advertising -- strike that.
The Red was the dominant cigarette in the 17 and younger age category, correct?
A. It says Marlboro Red is smoked by the younger group.
Q. It says it dominates in the 17 and younger age category, correct?
A. I don't -Oh, there it is. Yes, it does say that. No, it says Marlboro dominates.
Q. Okay. And it says Marlboro Red is smoked by the younger group, correct?
A. That's what it says, yes.
Q. And the younger group there is the 17 and younger age category, correct?
A. That is right, yes.
Q. Now when they talk about advertising, we see what happens when Marlboro Lights were first introduced, correct?
A. Do we see what happens?
Q. Yes.
A. Well I haven't read it, sir.
Q. Well let me read it to you. "When Marlboro Lights were first introduced, it was a management decision that the advertising should be significantly different from Red advertising. The problem was, however, that the money spent on Lights advertising was not reinforcing the franchise." Do you see that?
A. Yes.
Q. And what does "reinforcing the franchise" mean to you?
A. I would say that advertising a brand is to keep the awareness level of the brand up with its smokers, and by reinforcing it, you'd like to feel that your advertising is continuing to do that, maintaining the brand awareness.
Q. Keeping the brand awareness up among the smokers,

correct?
A. That would be my interpretation, yes.
Q. All right. "A decision was made to integrate Lights into Marlboro Country and that all advertising dollars spent would reinforce the franchise. We now have a single minded advertising campaign which is a source of strength for the brand and successfully conveys flavor and quality at the same time." Correct?
A. That's what it says, yes.
Q. So they took the advertising which was different for the 18- to 24-year- olds and merged it into the Red advertising where the younger group dominated, correct, sir?
*28 A. I wouldn't characterize it that way, no.
Q. But that's what the document says, isn't it?
A. No, I don't interpret it that way at all.
Q. Well, we do know that Marlboro Red was smoked by the younger group, correct?
A. Yes. But I would say that when we're talking about the Marlboro franchise, that by far the majority of the smokers of that brand were adults.
Q. Sir, that wasn't my question. We do know that Marlboro Red was smoked by the younger category, 17 and younger, correct?
A. Yes, that's what it says here.
Q. Okay. And that the Marlboro Lights were in the older category, which was the 18 to 24, correct? We know that.
A. That's what this says. It says --
Q. And we know that the advertising was merged to integrate the Lights into the Marlboro Country advertising in order to reinforce the franchise.
That's what it says, correct?
A. That's what it says, yes.
Q. Thank you.
Now, did you receive memos regarding what percentage of the market under 18 Marlboro has from 1994 on?
A. Not to my knowledge ever, sir, no.
Q. Not to your knowledge.
A. Not to my knowledge at all, sir.
Q. Well if you received it, you would know, wouldn't you?

A. I would have thought I certainly would know.
Q. Do you know if your people down in the operations got such information?
A. No, I don't. But I would be horrified if they did.
Q. You would.
A. Uh-huh.
Q. Did you ever ask them?
A. No, I didn't. I would take it for granted that they didn't.
Q. Well we see here that they were getting information in 1979 about 17 and younger people, don't we?
A. Well that's about 20 years ago, sir.
Q. And if they were 17-year-olds in 79, how old are they today, 36?
A. Yes.
Q. Maybe smoking for 20 years?
A. Well that could be the case if they started at 17 and continued to smoke, yes.
Q. And if they were addicted, they'd still be smoking, wouldn't they?
A. Well I don't believe they are addicted, sir. But nevertheless --
Q. But if they were addicted, they might still be smoking, correct, sir?
A. They might still be smoking.
Q. Get them young and hang on to them, correct?
A. That's not my philosophy, sir.
Q. But we do know that your company was looking at the 17 and younger category in 1979, don't we, sir?
A. That's what this says.
Q. Yes. And we do know that your brand, which you called the universal sign of consumer brands in your 1994 report, dominated in the 17 and younger category, correct?
A. That's what the document says here, sir, yes.
Q. Are you ashamed of this document?
A. I'm sorry about it, yes, I am.
Q. And if you go on to the next page, you'll see "1979 Special Programs." Do you see that?
A. Which page is that, sir?
Oh, yes, I do see it.

Q. See it?
A. Yes.
Q. First of all, right above that it says "Opportunities," to expand the demographic base, doesn't it?
A. Yes.
Q. "Brand has not achieved its full potential," correct?
*29 A. Yes.
Q. "Marlboro is No. 1 in 51 out of 93 marketing areas," correct?
A. That's what it says.
Q. "This means that it's not No. 1 in the other 42 areas," correct?
A. That's what it says.
Q. So they've got some special programs in 1979, correct?
A. Well the -- it --
There's a heading here that says that, yes.
Q. Yes. "Resort coverage in existence for eight years...," correct?
A. Yes.
Q. That's since 1971, correct?
A. Yes.
Q. And "this program represents a continuing brand presence among young adults," correct?
A. Yes, young adults.
Q. "For two to three weeks during the spring and summer breaks, the Sales Force promotes the brand heavily...," correct?
A. Yes.
Q. "Marlboro T-shirts, visors are given away at the beach, bars and other hang outs," correct?
A. Yes.
Q. "No publicity nor outside visibility is desired." Correct?
A. That's what it says, yes.
Q. Didn't want people to know that you were going around beaches and hangouts for young people, is that right?
A. Well I don't know what that means.
Q. Just don't know, sir.
A. No, I don't know. But I could imagine it could mean that, yes.

Q. Yes. And it says "The program is expanding and in 1979 will cover the New England Shore, Myrtle Beach, Texas, Padre Island, the Ozarks,
Wisconsin and the Jersey Shore." Correct?
A. Yes, correct.
Q. Are you ashamed of this, too, sir?
A. Well I don't know if that means young people, sir, below young adults. So young adults to me are 18 to 24.
Q. But if young adults were under 17 and went all the way down to 14, you'd be ashamed, wouldn't you?
A. I would not like that at all, sir.
Q. You'd be ashamed.
A. I -- I would be very sorry and ashamed, that we should not be marketing cigarettes to young people, but I believe that we can market them to adults.
Q. Another anomaly?
A. Anomaly in what respect, sir? In my -- the period that I've been here? This was before I was CEO.
Q. Oh, okay. Well the company's responsible for what it did before you were CEO, isn't it?
A. Yes, it is.
Q. Yes. And young people hang out on the New England shore - - and by "young people," I mean under age 18--don't they?
A. I should imagine so.
Q. And they hang out at Myrtle Beach, don't they?
A. I should imagine so, yes.
Q. They hang out at Padre Island, correct?
A. Well I don't know. I would imagine so.
Q. And you'd imagine they hang out in the Ozarks, correct?
A. I don't know.
Q. But you would imagine they would, wouldn't you?
A. I don't know that. I don't even know where the Ozarks are. And I'm ashamed to say that.
Q. Okay. Do they hang out in Wisconsin, sir, at beaches and parks and other hangouts?
A. I don't know, but I see young people on the beach, yes.
Q. And the Jersey Shore, are you familiar with that?
A. No, I'm not really familiar with that.

Q. You would agree it's fair to assume that young people hang out there, and by "young people" I mean under 18?
*30 A. On beaches?
Q. Yes.
A. Yes, I think that's fair to say.
Q. Can you direct your attention, then, to Exhibit 11780?
A. Yes.
Q. This is entitled "PRODUCT TESTING." If you turn to the next page, sir, it's got the full title.
A. Yes, I have it.
Q. You have it?
"PRODUCT TESTING SHORT COURSE," Daniel Ennis, John Tindall, Lisa Eby. Do you know them?
A. No, I -- I -- I met John Tindall some years ago.
Q. Okay. And what department was he in, sir?
A. I seem to recall he was in the product testing department.
Q. And-
A. Or maybe in market research.
Q. Marketing.
A. Market, yes --
I think he was in product testing in the R&D department.
Q. And this is dated January 23rd to January 24th, 1984, correct?
A. Yes.
Q. Richmond, Virginia, correct?
A. Yes.
Q. And if you go to the preface on the fwst page, you see it?
A. Yes.
Q. "In preparing for this short course in Product Testing, there were two considerations. First, we intended to make sure that basic principles and traditional forms of product testing and analysis were covered. Second, we felt that it was important to communicate our latest thinking on how product testing should be conducted which involves some new, less tried concepts." Do you see that?
A. Yes, I do.
Q. And the last sentence reads -- and please read it all if you want to, but the last sentence reads, "In this course we hope to provide both the backbone of our testing system and the

general direction in which our thinking is headed for the future." Correct?
A. Yes.
Q. And can you go to the Bates number which has *7504*. Now I want to direct your attention -- this is the -- in the "Demographic Developments."
Do you see that?
A. Yes.
Q. And this is where they were building the Marlboro brand. Do you understand that?
A. No, I don't.
Q. Well let me read the second paragraph. "Marlboro floundered for eight years and then hit a responsive chord among post-war baby-boom teenagers with the theme from the Magnificent Seven and an image uncalculatedly right for the wave of teenagers coming of smoking age." Do you see that?
A. Yes, I do see that.
Q. Are you ashamed of that, too?
A. "Coming of smoking age?" I don't think I'm ashamed of that, sir.
Q. You're not.
A. If they can reach an adult age when they can form their own decisions, I'm not ashamed of that, no.
Q. The wave of teenagers coming of smoking age? What if they were teenagers when they started to smoke, are you ashamed of that?
A. It doesn't say that, sir.
Q. Doesn't say that.
But we do know that Marlboro dominated in the under 17, correct?
A. In that earlier --
Q. Yes.
A. -- paper I read, that's what it said, yes.
Q. And the Magnificent Seven, that's the theme that you played when you met with the analysts, wasn't it?
A. That's what you told me.
Q. That's what the --
A. Well at least the Wall Street Journal said that.

*31 Q. They reported it, right?
A. I don't remember that though.
Q. And that's the one I asked you about when Mr. Bring was there, correct?
A. I don't think you asked me about that. I think he was mentioned in the article though.
Q. Right.
And I think Mr. Bring had said the message was "We could do a hell of a
lot better." That's what you -- the message you gave?
A. That I gave that message?
Q. Yes.
A. I don't remember saying that.
Q. You don't.
Mr. Bring is in the courtroom, isn't he?
A. Yes, he is.
Q. Been here the last two days.
A. Yes, he has.
Q. Did you ask him?
A. No, I didn't.
Q. Can you direct your attention, sir, to Exhibit 2557, which is in volume one.
A. Yes, I have that.
Q. Now this is a memo dated May 21, 1975, correct?
A. Yes.
Q. And it's to Dr. Seligman, correct?
A. To Dr. Seligman, yes.
Q. From Myron Johnston, correct?
A. Yes.
Q. It's entitled "The Decline in the Rate of Growth of Marlboro Red," correct?
A. Correct.
Q. And you see up in the upper right-hand corner they got Dr. Dunn's name?
A. Yes. That's handwritten there, yes.
Q. Now Dr. Dunn was in research and development, correct?
A. I believe so.
Q. Now the first paragraph says, "I think Dr. Dunn's memo

has very effectively dispelled the notion that nicotine reductions have been cause
-- have been the cause of the slackening in the rate of growth of Marlboro Red." Do you see that?
A. Yes, I do see that.
Q. And do you know if Dr. Dunn's memo referred to whether there was a threshold level of nicotine?
A. I beg your pardon?
Q. Did Dr. Dunn's memo refer to whether there was a threshold level of nicotine?
A. Of which memo of Dr. Dunn, sir?
Q. The one that's being referred to here.
A. Oh, I don't know. I -- I haven't seen any memo from Dr. Dunn --
Q. Okay.
A. -- that I can recollect.
Q. Well you saw a memo of Dr. Dunn this morning in 1972 relating to the San Martin conference where he put in the threshold level.
A. Oh, I'd forgotten that that was his.
Q. That was his.
A. Thank you-
Q. Correct?
A. -- for reminding me, uh-huh.
Q. Now it then goes on to say that Mr. Johnston chose to investigate the economic and demographic factors that could be responsible for the
decline in Marlboro's rate of growth, correct?
A. Yes.
Q. Now that doesn't mean that it's not growing in the number that's being sold, just the rate of growth had slowed down, correct?
A. Well may I read it, please?
Q. Sure.
A. Can you repeat your question, please?
Q. Yes.
The rate of growth doesn't mean that the brand is not growing, it's just the rate of it --
A. That's right.

Q. -- has slowed down, correct?
A. That's how I would interpret that, yes.
Q. So the brand is still expanding, it's just not expanding as rapidly, correct?
A. Well that would be my interpretation, yes.
Q. And people at Philip Morris, when that happens, want to investigate why that's happening, don't they?
*32 A. Perhaps so, yes.
Q. Well even today you'd want to do that, wouldn't you, sir?
A. Yes, I think I would, yes.
Q. And that's what Myron Johnston was doing here, correct?
A. Well that's what that part of this memo says, yes.
Q. And he states, "It was my contention that Marlboro's phenomenal growth rate in the past has been attributable in large part to our high market penetration among younger smokers and the rapid growth in that population segment. I pointed out that the number of 15- to 19-year-olds is now increasing more slowly and will peak in 1996 and then begin to decline. I also hypothesized that Marlboro would be particularly vulnerable to the recession." Correct?
A. That's what it says, yes.
Q. And he then points out his opinion with regard to why the growth rate declined for Marlboro, correct?
A. Yes.
Q. And the number one reason is slower growth in the number of 15- to 19- year-olds, correct?
A. That's what it says, yes.
Q. And number two, the recession, correct?
A. Yes.
Q. Number three, price increases in 1994, correct?
A. Yes.
Q. And number four, changing brand preferences of youngsters, correct?
A. Of younger smokers.
Q. Younger smokers. Correct?
A. Yes.
Q. Now he then traces the demographics down at the bottom of the page, correct?
A. Yes. It--

Well I don't think it traces, there's a heading "Demographics."
Q. "It has been well established by the National Tracking Study and other studies that Marlboro has for many years had its highest market
penetration among younger smokers." Do you see that?
A. Yes.
Q. And that's consistent with the other memo we saw, correct?
A. Which other memo, sir?
Q. The one that we saw that was on the letterhead of Philip Morris that said you dominated in the 17 and younger category. Do you remember that document?
A. Yes, I do. But that's not what this says. This says among younger smokers, and I didn't know what age he would be referring to there.
Q. All right. Well let's go on.
A. Uh-huh.
Q. "Most of these studies have been restricted to people age 18 and over, but my own data, which includes younger teenagers, shows even higher Marlboro market penetration among 15 to 17 year-olds." Correct?
A. Yes.
Q. And the date of this memorandum is after the Roper study, isn't it, sir?
A. That was 74, was it?
Q. Yes.
A. Yes, it is.
Q. And that looked at people all the way down to 14 and younger, didn't it?
A. Well I presume so, because the questionnaire had that in there.
Q. "The teenage years are also important because these are the years during which most smokers begin to smoke, the years in which initial brand selections are made, and the period in the life-cycle in which conformity to peer-group norms is greatest." Correct?
A. That's what it says, yes.
Q. Talking about 15- to 17-year-olds, correct, sir?

A. Yes, that's what it seems to.
Q. Looking at his own data, correct?
*33 A. I don't know if it's his own data. It says most of these studies.
Q. Well he talks about my own data, correct?
A. Yes, he does, he does talk about my own data.
Q. Yes.
A. But he -- I think he's saying he's referring to studies earlier on than his own data.
Q. Yes. And that own data is what he's referring to in that paragraph, correct? In addition to these other national studies.
A. Yes, it seems to be, that's right.
Q. Ashamed of this one, too?
A. Well I am ashamed of that, yes.
Q. Now is it another anomaly for this period of time before you became the CEO?
A. Well yes. An anomaly to me is an unusual occurrence, and frankly I wasn't around then. And I would have thought this was unusual and anomaly
-- an anomaly.
Q. But if we keep seeing more anomalies, pretty soon it becomes usual, doesn't it?
A. Well we've seen a couple. And two or three. It's a large company and we sell a lot of products.
Q. We're just talking about cigarettes, sir.
A. Yes, I understand that.
Q. Do you understand that?
A. I understand that, sir.
Q. Now one of the other reasons that he felt the decline was the recession and price increases, correct? Correct?
A. Yes.
Q. Can you go to page three. It starts talking about the recession here, correct?
A. Yes.
Q. And if you look at the last paragraph --
I take it you haven't read this entire document, have you, sir?
A. I don't remember ever seeing this document, sir.

Q. Okay. Now I'll represent to you that in the two pages coming up to this, that he talked about the demographics and what contribution that made
to the decline in the growth rate. Okay? Can you accept that?
A. That's a little bit too broad for me, sir.
Q. Well-
A. Could -- if you could --
Q. Can you accept that for the purposes of the next question? If you can't, then tell me when we get there. All right?
A. All right. Sure.
Q. Now at the recession --
In the recession, if you look at the last paragraph, he says, "This still leaves some of the gap to be accounted for, and does not explain why
Marlboro market share is below the regression line." Do you see that?
A. Yes, I do.
Q. All right. Now, "In my economic forecast, you may recall I said that Marlboro was particularly vulnerable to the effects of the recession because the highest unemployment rates are among the younger age groups, precisely the groups in which Marlboro's market penetration is highest." Do you see that?
A. Yes.
Q. Now do you recall me asking you yesterday whether or not it was fair to assume that teen-agers have less money than adults? Remember that?
A. Yes. I think I remember you saying that, yes.
Q. And I think that we may have quibbled a little bit, but I think eventually you agreed with me, didn't you?
A. That young people had less money than older people?
Q. Yes.
A. I agree with you, yes.
Q. Now we go on here, Mr. Johnston says, "In the first quarter of 1975, the employment -- unemployment rate of persons 16 to 19 years old was 20.4 percent, the highest it has been since the Bureau of Labor Statistics began compiling rates by age in 1948." Do you see that?
*34 A. Yes.

Q. And you know that we did have a recession in that period of time?
A. In 19--
Q. 75.
A. -- 75? Not specifically.
Q. Okay. You don't recall, is that right?
A. Well I don't recall. Let me see. I wasn't here in the United States then, so I don't recall exactly.
Q. Can you go on to the next page. "It is my contention that income elasticity is inversely proportionable -- proportional to income level. That is, the lower the income of a specific population group," the lower you go in income, "the greater will be the depressing effect on cigarette sales of a decline in real income." Do you see that?
A. Yes.
Q. You agree with that, don't you?
A. I don't know. It seems a fair comment.
Q. Now if you go down through that paragraph, about a third of the way from the bottom, you see where it starts "Marlboro smokers...?" It's over on the right-hand side.
A. Yes.
Q. Okay. "Marlboro smokers" --
No. It's up. Thank you. Same paragraph, but "Marlboro" -- there we go.
You see it, sir? You have it?
A. It's -- it's about halfway down the first paragraph?
Q. Right. We're together.
A. Right.
Q. Okay. "Marlboro smokers, being on the average considerably younger than the total smoking population, tend to have lower than average incomes. Thus, I would expect a proportionate -- disproportionately large number of Marlboro smokers to quit smoking or reduce daily consumption. In addition, young smokers are less habituated than older smokers, and can therefore probably quit or cut down more easily than a older smoker. Furthermore, many teenagers who might otherwise have begun to smoke may have decided against it because of the adverse economic conditions." Do you see that?

A. Yes.
Q. Now that ties in with what we just saw on the report to the board of directors in 1969 --
A. In which --
Q. -- where you get them by peer pressure, and later on in life they continue to smoke because they're hooked, doesn't it?
A. I don't remember --
Q. Well I may be paraphrasing --
A.-- that we get them by --
Frankly, I don't believe we hook smokers.
Q. All right. But that's what Dr. Wakeham reported to the board of directors as his conviction of the research department, correct?
MR. BLEAKLEY: Your Honor --
A. I don't remember --
MR. BLEAKEBY: I object -- excuse me. I object, Mr. Ciresi is characterizing the document, the document speaks for itself and that is
not what it said.
MR. CIRESI: Well we'll -- we'll go back then. Let's take a look --
TIJIE COURT: Rephrase your question.
Q. Let's go to Exhibit 10299. Don't lose your place there, hold it, sir. Okay?
A. Okay.
Q. And if you go to the Bates number 752, this is Dr. Wakeham's report to the board, correct?
A. Yes.
Q. Okay. "We are of the conviction, in view of the foregoing, that the ultimate explanation for the perpetuated cigarette habit resides in the pharmacological effect of smoke upon the body of the smoker, the effect being most rewarding to the individual under stress." Do you remember that?
*35 A. Yes, I do remember that.
Q. And we talked about "pharmacological" being drug, correct?
A. Yes. We had a disagreement about that, I think.
Q. Yes. Now if you go -- there it is, okay.

And earlier in that report to the board, people started smoking because of the advertising slogan or they gave one of two responses, that it
relaxes me or stimulates me.
A. Yes, I remember that.
Q. And the adolescent began to smoke because it enhanced his image in the eyes of his peers, correct?
A. Yes, I -- I recall that now.
Q. So if we can go back, then, to Exhibit 2557, page four, where we were --
A. Yes.
Q. Okay? Mr. Johnston's report to Dr. Seligman, correct?
A. Yes, I think that's what it is. That's right.
Q. And he says, "In addition, young smokers are less habituated than older smokers, and can therefore probably quit or cut down more easily than an older smoker. Furthermore, many teenagers who might otherwise have begun to smoke may have decided against it because of the adverse economic conditions." Correct?
A. That's what it says, yes.
Q. Okay. So essentially he's saying they're not hooked --
A. That's not what he's saying.
Q. -- as much as an older smoker, correct?
A. That's not what he's saying there.
Q. Well he doesn't say hooked, he says habituated, correct?
A. Yes, that's what he says, are less habituated.
Q. Now you'd agree that if the price goes up, teen-agers might not otherwise begin to smoke, correct?
A. That is absolutely right. And that's what we've negotiated with the states' attorneys general in our proposed resolution.
Q. We're going to get to that, sir.
A. Thank you.
Q. We're going to get to that.
Now you say that's absolutely right, but your company has protested that for years, that increasing prices would not depress teen-age smoking, hasn't it?
A. I don't know about that, sir.
Q. You don't?
A. No.

Q. It's taken public positions on that, hasn't it, sir?
A. Not to my knowledge.
Q. Never?
A. I don't know.
Q. Now if you turn to the last page, who do we see getting copies of this memo? Mr. McDowell, correct?
A. Yes.
Q. Vice-president of the company, correct?
A. I'm not sure. He could have been.
Q. Mr. Morgan, vice-president, brand management and CEO, correct?
A. In -- at this point in time in 1975,1 think Jim Morgan was what he said yesterday, a brand manager.
Q. Right. That's what I said, VP brand management, and he became CEO of Philip Morris U.S.A., correct?
A. Yes, a few years ago.
Q. Stayed till 1994, correct?
A. About then, yes.
Q. When did he leave?
A. Oh, I think in November.
Q. November of 1994?
A. No, November 1997.
Q. November 1997.
A. Uh-huh.
Q. Just a couple days after his deposition was taken.
A. Is that so?
Q. You don't know?
A. No, I don't know.
Q. Dr. Wakeham got a copy. Vice-president, correct?
A. Yes.
*36 Q. Mr. Resnik, who is that?
A. Frank Resnik?
Q. Yes.
A. Frank Resnik had been CEO of Philip Morris U.S.A. He's now since deceased.
Q. CEO of Philip Morris U.S.A.. correct?
A. I believe so, yes.
Q. Okay. Mr. Thomson. correct?
A. Yes.

Q. And who is he?
A. I seem to recall he ran Philip Morris's operations in Europe.
Q. In Europe?
A. Uh-huh.
Q. Okay. Dr. Osdene, vice-president of research and development, correct?
A. I'm not sure of his title, but he was in R&D, yes.
Q. And Dr. Gannon, do you know who he is?
A. Well I remember him. He was in R&D, yes.
Q. Yes. And Mr. Daniel, do you know who he is?
A. No, I don't know who he is.
Q. So this went to the president, a future president, and high management of the company, didn't it, sir?
A. Well I don't know that it went to the president, sir.
Q. Well the president of the international, Mr. Resnik.
A. No, no. He wasn't president of the international.
Q. What was he president of?
A. He became president of Philip Morris U.S.A.
Q. I'm sorry.
A. I'm not sure when.
Q. Do you know if he was president at that time?
A. I don't know.
Q. Okay.
A. This is 1975?
Q. Yes.
A. No, he was not, to my knowledge, no. He was in -- I think he was in research and development.
Q. High officials of the company, correct?
A. They were senior executives, yes.
Q. Talking about children and Marlboro's role in terms of the market for those children, correct?
A. This letter from Myron Johnston talks about that.
Q. Yes.
A. Yes.
Q. Ashamed of this one, too?
A. I am ashamed. I'm embarrassed about that, yes.
Q. Another anomaly?
A. Well Jim Morgan described it as -- as an anomaly. I think

that's a fair description, yes.
Q. So it's another anomaly. Fair statement?
A. Well I think you said it was an anomaly before, so I wouldn't like to keep saying the same document is an anomaly. So that it sounds like the
same document is ten anomalies, it's one anomaly.
Q. All right. So this is --
I'm asking you for yours. This is another anomaly that you've seen,
correct?
A. You asked me about this document before as being an anomaly, and I said yes, I think it is.
Q. All right. I apologize if I already asked you that question.
A. Thank you.
Q. Can you go to Exhibit 10339.
A. Yes, I have it.
Q. And the date of this document, sir, is 1981?
A. Well I can't see the --
Oh, there we are. Yes.
Q. I apologize for that. If you turn to the third page of the document, you'll see it's on Philip Morris letterhead, and it's got the date March
31, 1981?
A. Yes. I have that.
Q. Okay. Philip Morris U.S.A., correct?
A. Yes.
Q. To Dr. Seligman from Myron Johnston, correct?
A. Yes. Yes.
Q. This is about, what, six years after the last document we saw, correct?
A. I've forgotten. That was 75?
Q. Yes. Okay.
MR. CIRESI: We'd offer Exhibit 10339, Your Honor.
*37 MR. BLEAKLEY: No objection.
TUE COURT: Court will receive 10339. BY MR. CIRESI
Q. If you could turn to the page that's got Philip Morris U.S.A.
Research Center, it's the first page that has actual type on it, sir. The

Bates number is 804.
A. Oh.
Q. 804.
A. Okay. Got you. That's --
Q. Do you have it?
A. Yeah. Got it.
Q. Okay. The title of this is "Young Smokers Prevalence, Trends, Implications, and Related Demographic Trends." Correct?
A. Yes.
Q. And it's written by Mr. Johnston, correct?
A. Yes.
Q. Approved by Harry Daniel and Carolyn Levy, correct?
A. Yes.
Q. Goes through the distribution list of a number of people, correct?
A. Yes.
Q. And if you go to Bates number 806, there's some cc 5, correct?
A. Yes.
Q. And Mr. Thomson was director of development, correct?
A. Not to my knowledge, no.
Q. Do you--
A. I -- I think he was the person who ran Philip Morris Europe.
Q. Philip Morris Europe.
A. I think that's what his job was.
What year was this again?
Q. 1981, sir.
A. 1981. No, I think he'd left Philip Morris by then, so I don't know who Mr. Thomson is.
Q. Okay.
A. I'm getting those confused, I think, here. Because I know that Mr. -The Mr. Thomson I'm thinking of left Philip Morris, I think, in 1976.
Q. Okay. If I represent to you that he was director of development, that's been told to us by Philip Morris, would you accept that?
A. Yes, I would accept that.

Q. All right.
A. Uh-huh, uh-huh.
Q. And Mr. Daniel, do you know who that is?
A. No, I don't.
Q. Do you know who Dr. Levy is?
A. Yes, I do. That's Dr. Carolyn Levy.
Q. Senior vice-president, marketing and sales?
A. Today?
Q. Yes.
A. Yes.
Q. And Mr. Meyer, do you know who he is?
A. No, I don't.
Q. And Mr. Zoler, do you know if he was the director of marketing research?
A. I remember that some years ago, yes.
Q. Now if we go to the page that has Bates numbers 805, do you see that?
A. Yes.
Q. You see the trends, that are set forth there?
A. Yes.
Q. "After increasing for over a decade, the prevalence of teenage smoking is now declining sharply." Do you see that?
A. Yes.
Q. "After increasing for over a decade, the average daily consumption of teenage smoking – smokers is declining." Do you see that?
A. Yes, I do see that.
Q. Three, "After increasing 18 percent from 1967 to 1976, the absolute number of 15- to 19-year-olds will decline 19 percent during the 1980's, with the period of sharpest decline beginning in 1981." Correct?
A. Yes, I do see that.
Q. "Beginning in 1981 the absolute number of 20- to 24-year-olds, parent, the ages during which average daily cigarette consumption increases most rapidly, will begin to decline, after increasing for the past 20 years," correct?
A. Yes.
Q. And that's because there were less teen-agers coming into that market, correct, based on what is set forth?

*38 A. Well yes, I think that's a fair --
That's logical, I think, yes.
Q. Okay. Now if you go on to the next page --
A. Uh-huh.
Q. If you want to read the rest there, please do.
Page two, "It is inevitable therefore, the industry sales will begin to decline within the next four years. Thus, Philip Morris USA can sustain its past rate of growth only by an acceleration of the rate of increase i~ market share." Do you see that?
A. Yes.
Q. "While this news is not good for the industry, I believe we can use these data and other data I plan to report on to good advantage in order to minimize the adverse effect on Philip Morris." Correct?
A. Yes, that's what it says.
Q. Good planning, correct?
A. I beg your pardon?
Q. That's a good planning principle, correct?
A. Yes. I think that's sensible, yes.
Q. All right. Then he goes on, "This report deals with only one of these trends -- teenage smoking and attitudes toward smoking, together with related demographics."
Is that a good principle, too?
A. No, I don't think so.
Q. Are you ashamed of this one, too?
A. Well no, I -- I would need to know more about it because I don't think this suggests at all that we're marketing cigarettes to teenage smokers. I've got a feeling that Jim Morgan talked about this yesterday. Did he?
Q. No, this has not been introduced.
A. Well, I think what he is talking about was that Mr. Johnston had been collating public information.
Q. Yeah. He was a provocateur, correct?
A. That's what he said, yes. That's right.
Q. Somebody who stimulated conversation, correct?
A. Well Jim described him as that, yes.
Q. Just like you described the board as being stimulated by conversation.

A. I didn't say exactly those words, sir.
Q. Well the record will reflect what you said.
A. Uh-huh.
Q. "This report deals with only one of these Wends -- teenage smoking and attitudes towards smoking together with related demographics. Subsequent reports will cover the social, economic and psychographic characteristics of teenage smokers and the demographics of other significant age groups." Now, if that's what Philip Morris did, you'd be ashamed of that, wouldn't you?
A. Well I don't think that's good at all, sir.
Q. Pardon me?
A. I don't think that's good at all.
Q. You'd be ashamed.
A. I'd be ashamed. Yes, I would agree with that.
Q. Another anomaly, correct?
A. It would be an anomaly, I think, to me. I wasn't around at that time. But it is certainly anamolous to the Philip Morris I know, I can tell you that.
Q. But the company would be responsible for its actions, wouldn't it, sir?
A. The company is responsible for its actions.
Q. And it would be accountable for its actions, wouldn't it?
A. I believe every company is accountable for its actions.
Q. Must be accountable, correct?
A. Must be accountable?
Q. Yes.
A. Yes, I think that's fair.
*39 Q. Under our system of justice it must be accountable.
A. I think under any-MR. BLEAKLEY: Your Honor, this is argumentative.
THE COURT: It's becoming argumentative, counsel.
Q. Let me ask it this way: Would you agree that under our system of justice, it must be held accountable?
MR. BLEARLEY: I don't think it's relevant. "Under our system of justice," I think that's argumentative and I object to it.
THE COURT: No, you may answer that.
MR. BLEAKLEY: "Under our system of justice?"

THE COURT: You may answer the question.
A. Could you please repeat the question, sir?
Q. Would you agree that under our system of justice a company should be held accountable for its actions?
A. Yes. I think that's reasonable, yes.
Q. Now Mr. Johnston goes on to say, "Because the major data sources have just become available, and because of the importance of these data to the company, I have elected to report the data in a series of memoranda rather than wait and issue all of the material at once." Correct?
A. Yes.
Q. And if you go to the contents, you see the summary, don't you, sir?
A. Yes.
Q. Teenage smoking prevalence 1968 to 1974, correct?
A. Yes.
Q. Teenage smoking prevalence 1975 to 1980, correct?
A. Yes.
Q. Smoking prevalence and educational aspirations, correct?
A. Yes.
Q. Race differences in smoking prevalence, correct?
A. Yes.
Q. Regional differences in smoking prevalence, correct?
A. Yes.
Q. Future smoking expectations, correct?
A. Yes.
Q. Reasons for decline in teenage smoking, correct?
A. Yes.
Q. Conclusions and implications, correct?
A. Yes.
Q. If you go to the next page to the summary, do you see down in the third paragraph there's reports about 12- to 18-year- olds?
A. Yes, I do.
Q. "Average daily consumption of these young smokers also increased...?"
A. Yes, I do see that.
Q. Do you think it's a good idea for Philip Morris to be tracking 12-to 18-year-old smokers?

A. Well I don't know if they're tracking them.
Q. Well let me ask it this way, because I don't want to quibble with you. Okay?
A. Thank you.
Q. Do you think it's good for Philip Morris to be reporting to a number of people within the company, including people in management, about average daily consumption of teenage smokers, not even teen-agers, 12 to 18?
A. No, I don't think that's appropriate, sir.
Q. You're ashamed of that, aren't you, sir?
A. Well I'm ashamed of it, but I don't know the circumstances under which this was done.
Q. And if you turn to the "Conclusions and Implications "--
A. Can you point me to a page, please?
Q. Sure. I'm sorry. Page 828, last three Bates numbers. "The decline in the percent of teenagers who smoke, their decreased levels of consumption, and the decline in their absolute numbers means that the industry can no longer rely on an ever increasing pool of teenage smokers to replace adult smokers lost through natural attrition." Do you see that?
*40 A. Yes.
Q. "Natural attrition." People who die, correct?
A. Well I would say die or quit.
Q. Die or quit.
A. Hmm.
Q. And maybe die from lung cancer, correct?
A. Well it's certainly possible.
Q. Die from coronary heart disease, correct?
A. Well people can die from that, yes, sw.
Q. Die from chronic obstructive pulmonary disease, correct?
A. People can die from that, sir, yes.
Q. Die from bladder cancer, correct?
A. I tnink there are many things people die from, sir.
Q. All of the things I mentioned have been found to be caused by cigarette smoking by the Surgeon General of the United States, correct,
sir?
A. I'm not so sure about that, but I certainly agree that he has

said lung cancer and emphysema and heart disease.
Q. All found to be caused, correct, sir?
A. Yes, that's what he has said.
Q. And your company and the other companies through The Tobacco Institute have lobbied in this state to kill legislation that would keep children from smoking, haven't you?
A. I'm not familiar with that, sir.
Q. Can you direct your attention to Exhibit 14488.
A. Yes, I have it.
Q. This is a Tobacco Institute document. Do you see it, sir?
A. Well I don't know that it is, but I'll accept that it is if you tell me it is.
Q. You see down in the lower right-hand corner "TI Minnesota," you see that?
A. Yes, I do.
Q. Do you know if this was another document that was just released on the Internet last Friday?
A. I have no idea.
Q. And you see the date in the upper left-hand corner?
A. Yes.
Q. April 11th, *1985?*
A. Yes, I do.
Q. And I'll represent to you that the author and the addressee or recipient of this memo worked for The Tobacco Institute in *1985.* Will you
accept that?
A. I don't know that, but I'll accept that, yes.
Q. And your company financed The Tobacco Institute in *1985,* didn't it?
A. I think we would have been one of the contributors. I think all of the companies contribute to The Tobacco Institute.
Q. You would have been the largest contributor because you had the largest share of the market, correct?
A. I believe that's right, because I believe we contribute - - But in *1985,* I'm not sure if we were the largest. We probably were.
Q. And there's a background section. Do you see that?
A. Yes.

Q. "Since January, as you know, the situation in Minnesota has been uncommonly active."' Do you see that?
A. Yes.
Q. And it says that -- 39-point technical advisory committee report on non- smoking and health, do you see that?
A. Yes.
Q. And there was a raft of legislative issues, correct?
A. Well hang on. I can't keep up with you. Held the promise, yes, I see that.
Q. Thirty-nine separate legislative proposals, correct?
A. That's what it says.
Q. And do you see where it says about halfway down or a little bit more than halfway in that paragraph, "The ink" -- it's over on the right-hand side.
*41 A. Yes, I have that.
Q. "The ink was not yet dry on this report before our lobbyists initiated an aggressive and focused effort in communication with legislative leadership and targeted key legislative activists. This effort was successful in preventing a majority of the report from seeing its way from the drafting board to a legislator's hand." Do you see that?
A. Yes, I do.
Q. It also points out that ten separate bills survived and have evolved to form the basis of our opponent's legislative agenda, correct?
A. That's what it says.
Q. And then it goes on to point out that these strategic moves came on the heels of a four-day visit by United States Surgeon General C. Everett
Koop, correct?
A. Yes, that's what it says.
Q. And that Koop, in a well-publicized media event, testified before several legislative committees and study groups, correct?
A. Yes, that's what it says.
Q. And it says here that in a previous memo, the author, Mr. Brozek, had noted that Koop's appearance in Minnesota was timed to bring life to a flagging and scattered legislative effort by the Minnesota lung, cancer, and heart

organizations, correct?
A. That's what it states.
Q. Public health organizations, correct, sir, those three?
A. Which three, sir?
Q. Lung, heart, and cancer.
A. Yes, they would seem to be -- that seems to be accurate.
Q. Interested in the public health, correct?
A. That -- that would seem to me to be accurate, yes.
Q. Do you remember the promise in the Frank Statement to cooperate closely with those whose duty it is to protect the public health?
A. Yes, I remember you pointing that out to me.
Q. And if you turn to the next page, sir, --
A. Yes.
Q. -- talks about the status of bills, correct?
A. Yes, it seems to.
Q. And do you see the status for SF, which would be Senate File 38?
A. Yes.
Q. And that was a bill which would increase state excise taxes on cigarettes to 54 cents a pack, earmarking those revenues for the state medical assistance fund. Do you see that?
A. Yes, Ido.
Q. And that language contained in the legislation formally referred to tobacco-related illnesses?
A. Yes, I see that.
Q. And do you see the legislative program action notes where it says that efforts by your organization, The Tobacco Institute, are continuing to kill this bill in committee?
A. I read that, yes.
Q. And can you direct your attention to page 954 of this document.
A. Yes, I see that.
Q. And you see Senate File 776?
A. Yes.
Q. And House File 810?
A. Yes.
Q. And this was bipartisan legislation by Senator Nelson, a

member of the Democratic Party, and Representative Quist, a member of the Republican Party. Do you see that?
A. Well I didn't know Senator Quist was a member of the Republican Party.
Q. Let me represent to you that IR stands for the Republican Party, and
DFL stands for the Democratic Party. Will you accept that?
*42 A. Yes, I will.
Q. And then it reads that this is Governor Perpich's priority legislation. Bill would increase cigarette tax by 15 cents per pack n order to segregate revenues for youth education, community stop-smoking programs, work-place initiatives, sampling ban, advertising bans, and then sewer construction, mosquito control and general mischief, do you see that?
A. Yes.
Q. And right below that, legislative program action notes, your organization, they stated it is at the finance committee level that we hope to defeat this measure, correct?
A. Yes, it says that.
Q. Are you ashamed of that, too?
A. No, I'm not ashamed of it, sir, because I haven't read the whole report.
Q. And if you turn to the back page, sir, the last page, page nine.
A. Page --
Q. Nine, at the top.
A. Yes.
Q. Do you have it?
A. Yes.
Q. The conclusion is stated there, isn't it?
A. Well I don't know it's a conclusion. It's the last paragraph.
Q. Well it's under "SUMMARY," isn't it?
A. Well I haven't seen that. You haven't referred me to that. I now see it, yes.
Q. "Every possible legislative, political, social and theoretical angle is being utilized in our efforts to get out of this session unscathed. Since Minnesota has seen fit to designate itself, as Surgeon General Koop stated, a model for the country' with

regard to anti-smoking legislation, our only choice in this matter is a complete victory. Anything less could be used against us in other areas. We will employ all means to secure that victory." Do you see that?
A. Yes, I do.
Q. And you were the major contributor, your company, to that effort, weren't you, sir?
A. Well I don't know if we were, but we would have been a significant contributor to The Tobacco Institute.
MR. CIRESI: Your Honor, that might be --
THE COURT: We should recess and reconvene tomorrow morning at 9:30.
TITLE CLERK: Court stands in recess, to reconvene tomorrow morning at 9:30.
(Recess taken.)

A Frank Statement
to Cigarette Smokers

RECENT REPORTS on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do not believe that any serious medical research, even though its results are inconclusive should be disregarded or lightly dismissed.

At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments.

Distinguished authorities point out:

1. That medical research of recent years indicates many possible causes of lung cancer.
2. That there is no agreement among the authorities regard-big what the cause is.
3. That there Is no proof that cigarette smoking is one of the causes.
4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous scientists.

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.

We believe the products we make are not injurious to health.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

For more than 300 years tobacco has given solace, relaxation,

and enjoyment to mankind, At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence.
Regardless of the record of the past, the fact that cigarette smoking today should even be suspected as a cause of a serious disease is a matter of deep concern to us.

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what Is already being contributed lay individual companies.

2. For this purpose we are establishing a Joint Industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.

3. In charge of the research activities of the Committee will be a scientist of unimpeachable Integrity and national repute. In addition there will beau Advisory Board of scientists disinterested in the cigarette Industry. A group of distinguished men front medicine, science, and education will be invited to serve as this Board. These scientists will advise the Committee on its research activities.

This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

TOBACCO INDUSTRY RESEARCH COMMITTEE
5400 EMPIRE STATE BUILDING NEW YORK I, N. Y.

*SPONSORS:*

THE AMERICAN TOBACCO COMPANY INC.
*Paul M. Hahn, President*

BENSON & HEDGES
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(an organization of Tobacco Growers)
*J. R. Hutson, President*

UNITED STATES TOBACCO COMPANY
*J. W. Peterson, President*

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LAW STUDENT IN PROPRIA PERSONA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAHER W. SOLIMAN,

Plaintiff,

Case No.
C 00 1530 MJJ

vs.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J.REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC. COUNCIL FOR TOBACCO RESEARCH-U.S.A. INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.

Defendants.

//FIRST AMENDED COMPLAINT FOR DEMAND EQUITABLE RELIEF

STRICT LIABILITY, NEGLIGENCE, BREACH OF EXPRESS WARRANTY, BREACH OF IMPLIED WARRANTY, FRAUD, INTENTIONAL MISREPRESENTATION, CONSPIRACY TO COMMIT FRAUD AND MISREPRESENTATION, AND EQUITABLE RELIEF

JURY TRIAL DEMANDED

Plaintiff, MAHER W. SOLIMAN, complains against Defendants, and each of them, demands a trial by jury of all issues, and for causes of action alleges as follows:

1. Defendant, PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A.") is and at all times herein mentioned was a Virginia corporation organized and qualified to do business and doing business in the City and County of San Francisco, California, existing under the laws of the United States and the State of California.

2. Defendant, PHILIP MORRIS COMPANIES, INC. ("PMC"), is a holding company and is the sole shareholder of Philip Morris Incorporated, is and at all times herein mentioned was a Virginia corporation. Defendant PHILIP MORRIS COMPANIES, INC. was and is in control of sensitive and inculpatory documents related to smoking, disease and addiction and it is a participant in the conspiracy described herein and has caused harm to plaintiff, existing under the laws of the United States and the State of California.

3. Defendant, R.J. REYNOLDS TOBACCO COMPANY ("RJR"), is and at all times herein mentioned was a New Jersey corporation organized and qualified to do business and doing business in the City and County of San Francisco, California, existing under the laws of the United States and the State of California.

4. Defendant, BROWN & WILLIAMSON TOBACCO CORPORATION ("B&W"), is and at all times herein mentioned was a Delaware Corporation, organized and qualified to do business and doing business in the City and County of San Francisco, California, existing under the laws of the United States and the State of California.

5. Defendant, B.A.T. INDUSTRIES, PLC ("BAT"), is and at all times herein mentioned was a British Corporation, with its place of business in London, Great Britain, and is the sole shareholder of Brown & Williamson and through Brown & Williamson, has placed cigarettes into the stream of commerce with the expectation that substantial sales of cigarettes would be made in the United States and in California. B.A.T. INDUSTRIES has conducted significant research on smoking, disease and addiction. B.A T. INDUSTRIES was and is in control of sensitive and inculpatory documents on smoking, disease

and addiction and it is a participant in the conspiracy described herein and has caused harm to plaintiff. B.A.T INDUSTRIES is existing under the laws of the United States and the State of California.

6. Defendant , AMERICAN TOBACCO COMPANY ("ATC"), is and at all times herein mentioned was a Delaware Corporation, organized and qualified to do business and doing business in the City and County of San Francisco, California, existing under the laws of the United States and the State of California.

7. Defendant, LORILLARD TOBACCO COMPANY ("LORILLARD"), is and at all times herein mentioned was a Delaware Corporation, organized and qualified to do business and doing business in the City and County of San Francisco, California, existing under the laws of the United States and the State of California.

8. Defendant, LIGGETT GROUP, INC. ("LIGGETT"), is and at all time herein mentioned was a Delaware Corporation, organized and qualified to do business and doing business in the City and County of San Francisco, California, existing under the laws of the United States and the State of California.

9. Defendant, COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC. ("CTR"), successor in interest to the Tobacco Industry Research Committee ("TIRC"), is and at all times herein mentioned was a New York association organized and qualified to do business and doing business in the City and County of San Francisco, California, existing under the laws of the United States and the State of California.

10. Defendant, TOBACCO INSTITUTE, INC. ("TI"), is and at all times herein mentioned was a New York corporation organized and qualified to do business and doing business in the City and County of San Francisco, California, existing under the laws of the United States and the State of California.

11. Defendants, PHILIP MORRIS INCORPORATED, PHILIP MORRIS COMPANIES, INC., RJ REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T INDUSTRIES, PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, and LIGGETT

GROUP, INC., referred to hereinafter collectively as "CIGARETTE MANUFACTURERS".

12. Defendants, COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC. and TOBACCO INSTITUTE, INC., are referred to hereinafter collectively as "TRADE ASSOCIATIONS".

13. Defendants, CIGARETTE MANUFACTURERS and defendants TRADE ASSOCIATIONS, are referred to hereinafter collectively as "TOBACCO INDUSTRY".

14. The identities of the Defendants designated as DOES 6 THROUGH 50, INCLUSIVE, and their capacities and relationship to other Defendants herein are unknown at this time and the same will be alleged when determined. Plaintiff alleges on information and belief that these Defendants were responsible for the acts complained of herein.

15. At all relevant times herein mentioned, each Defendant was the agent, servant, or employee of the other Defendants, and by participating in the conduct alleged in this Complaint, did so within the course and scope of that agency or employment. Each Defendant is sued individually as a co-conspirator and aider and abettor. Defendants knowingly and/or recklessly conspired to engage, and/or aided and abetted, in the course of conduct set forth in this Complaint.

16. At all relevant times herein mentioned, PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC. ("PMC"), R.J. REYNOLDS TOBACCO COMPANY ("RJR"), BROWN & WILLIAMSON TOBACCO CORPORATION ("B&W"), B.A.T. INDUSTRIES, PLC ("BAT"), AMERICAN TOBACCO COMPANY ("ATC"), LORILLARD TOBACCO COMPANY ("LORILLARD") and LIGGETT GROUP, INC. ("LIGGETT"), were and are manufacturers and distributors of tobacco products throughout California and the United States.

17. At all relevant times herein mentioned, COUNCIL FOR TOBACCO RESEARCH-U.S.A. , INC. and TOBACCO INSTITUTE , INC., were and are involved in promotion, lobbying, medical research, political endorsements and other activities or related ventures, in connection with and on behalf of the Tobacco Industry,

throughout California and the United States.

18. Plaintiff, MAHER W. SOLIMAN, referred to hereinafter as "SOLIMAN" , a forty-six year old male, resident of the City of San Francisco, California. Plaintiff began smoking when he was fourteen years of age. Over the years he has smoked Camel, Marlboro King Size and Marlboro 100's, among other brands, which are manufactured and distributed as tobacco products by Defendants CIGARETTE MANUFACTURERS.

19. This court has jurisdiction over the subject matter of this action and this venue because plaintiff is a resident in the Northern District of California and because Defendants did and continue to do business in the Northern District of California and caused tortious injury to the plaintiff by acts or omissions in the Northern District of California, or caused tortious injury to the plaintiff in the Northern District of California by acts or omissions outside the district.

20. Plaintiff began smoking when he was fourteen years of age in reliance on defendants' representation that smoking is a habit and not an addiction and their representation that there are no proven harmful effects to smoking cigarettes. Plaintiff has always relied to his detriment upon the representation made by the TOBACCO INDUSTRY that smoking is a habit and not addiction.

21. On or about October 15th, 1999, a former employee of the tobacco industry named "Jeffrey Wigand" was interviewed by host Laurie Dhue in a "news" segment on MSNBC. The interview of Mr. Wigand was promoting the motion picture "The Insider".

22. On or about October 15th, 1999, plaintiff discovered from the aforementioned interview with Mr. Wigand on MSNBC, that the motion picture "The Insider" is based on actual events witnessed by Mr. Wigand as a former employee of the Tobacco Industry . The interview implied that the Tobacco Industry engaged in a conduct which amounted to suppressing and concealing the dissemination of information of the harmful effects of smoking.

23. On or about October 15th, 1999 and upon learning the news which was revealed in the "news" segment on MSNBC of the aforementioned interview with Mr.

Wigand, plaintiff began a daily effort to kick the habit of smoking but he was unsuccessful. The number of times plaintiff has tried to stop smoking has been in excess of 50 times to no avail. The longest period of time that plaintiff was successful was three days. Plaintiff has unsuccessfully utilized Nicorette gum.

24. On or about January 20th, 2000, plaintiff suffered symptoms of shortness of breath accompanied with chest pain, when he was situated laying down.

25. On or about January 26th, 2000, plaintiff was diagnosed with smoking-related illness. Plaintiff was diagnosed with lung disease known as "dyspnea", which is an impairment to the lung function, "orthopnea", or inability to breath except in an upright position, among other diagnosis, including but not limited to, premature lung aging estimated to be eighty-five years, physical distress, depression, extreme anguish, nervousness, tension, anxiety and loss of sleep.

26. On or about January 26th, 2000 and upon plaintiff's diagnosis, plaintiff began investigating the TOBACCO INDUSTRY. The investigation revealed, and documents obtained by plaintiff suggest, that the TOBACCO INDUSTRY actively concealed and suppressed information concerning the addictive nature of nicotine and the defective nature of the tobacco products to maximize its profits and its market share. Only then did Plaintiff discover that smoking was not a habit, but an addiction and that he was and is addicted to tobacco product.

27. Plaintiff could not have discovered, prior to the interview of Mr. Wigand on MSNBC, on or about October 15th, 2000, the addictive nature of nicotine in cigarettes and the health hazards of tobacco, because the TOBACCO INDUSTRY have actively and fraudulently concealed and suppressed the addictive nature of their product (cigarettes) and its causes and potential safety consequences, from plaintiff, the consuming public and governing agencies.

28. Plaintiff alleges on information and belief that these defendants manipulated the level of nicotine in tobacco products so as to make these products addictive. Said defendants further concealed the results of testing and research conducted by or at the request of Defendants, including testing and research of the COUNCIL FOR

TOBACCO RESEARCH, Special Projects Division, establishing the addictive nature of nicotine and health hazards of tobacco.

29. At all relevant times herein mentioned a safer product was available to defendants but was never marketed and was concealed and never reported to the public, including plaintiff herein.

30. The addictive nature of nicotine is a defect which is virtually impossible to identify and detect by the consumer while the TOBACCO INDUSTRY had full knowledge of the facts set forth in this Complaint and knowingly manufactured and sold millions of the tobacco product with manipulated levels of nicotine throughout California and the United States as well as worldwide.

31. The TOBACCO INDUSTRY has engaged in a conduct which amounted to actively and fraudulently concealing and suppressing the addictive nature of the defected tobacco product and its causes and potential safety consequences, from plaintiff, the consuming public and governing agencies.

32. The TOBACCO INDUSTRY was required by law to report safety-related product defects to the United States Congress on its investigation on March 25th, 1994 and April 14th, 1994 and to respond truthfully and accurately to inquiries made by the United States Congress in the course of its investigations. In response to United States inquiries in connection with those investigations, the TOBACCO INDUSTRY concealed the truth about the addictive nature of nicotine and the defective nature of the tobacco product and falsely represented to the United States Congress under oath that tobacco containing nicotine is not addictive and that smoking cigarettes does not cause disease and death.

33. As a result of TOBACCO INDUSTRY'S false representations, United States Congress closed its investigations. Plaintiff is informed and believes that by concealing the addictive nature of nicotine and the defective nature of the tobacco product, the TOBACCO INDUSTRY intended to, and did, avoid a government regulating of the product.

34. The TOBACCO INDUSTRY systematically concealed from Plaintiff, members of the consuming public,

United States Congress and the news media, material information about the nature and scope of the addictive nature of nicotine and the defective nature of the tobacco product and the safety risk created by such defect, and the resulting injuries and death. Plaintiff is informed and believes that the TOBACCO INDUSTRY actively concealed and suppressed information concerning the addictive nature of nicotine and the defective nature of the tobacco product to maximize its profits and its market share, and to avoid a costly government regulation and/or to avoid a costly recall, and/or the cost of correcting such defect.

35. In furtherance of its active concealment and suppression of information concerning the addictive nature of nicotine and the defective nature of the tobacco product, the TOBACCO INDUSTRY caused to be published deceptive and misleading advertising that emphasized that its product is not addictive and that smoking cigarettes does not cause disease and death, when in fact it did. Plaintiff is informed and believes that the TOBACCO INDUSTRY intended such false and deceptive advertising to mislead the consuming public into a false sense that tobacco product is not a health hazard and is not addictive.

36. At all relevant times mentioned herein, the TOBACCO INDUSTRY'S knowledge and understanding of the addictive nature of nicotine and the defective nature of the tobacco product and its resulting danger to the public was substantially greater than that of the Plaintiff and the consuming public, who were unaware of the nature or cause of the tobacco defect, and had no access to the TOBACCO INDUSTRY'S research and testing results and other internal information in that regard.

37. The TOBACCO INDUSTRY refused and continues to refuse to acknowledge or accept responsibility for the defect of their tobacco product.

38. The TOBACCO INDUSTRY has repeatedly and publicly denied that nicotine is addictive, as recently as March 25th, 1994 and April 14th, 1994, where top TOBACCO officials, including but not limited to, Chief Executive Officers of the TOBACCO companies, testified under oath that nicotine is not addictive.

39. The TOBACCO INDUSTRY continues to take the position that tobacco is not addictive, with full

knowledge that nicotine is an addictive poison and cigarettes cause death and disease. The TOBACCO INDUSTRY has known for over twenty-five years that nicotine is addictive and has also known of the health related consequences of cigarette smoking.

40. The TOBACCO INDUSTRY has intentionally suppressed scientific and medical evidence that nicotine is addictive. On or about January 1972, a meeting of twenty-five scientists, sponsored by Defendant COUNCIL FOR TOBACCO RESEARCH-U.S.A. including a scientist from Defendant PHILIP MORRIS, Dr. William L. Dunn, Jr. among others. The meeting took place in St. Martin, to determine the answer to the question "Why do people smoke cigarettes?" The group of scientists reached the conclusion that nicotine is why people smoke cigarettes; without nicotine people would not smoke.

41. During the year of 1973, Dr. William L. Dunn, Jr., of PHILIP MORRIS, expressed the many virtues and psychological benefits of tobacco, which was funded by Defendant COUNCIL FOR TOBACCO RESEARCH-U.S.A.

42. On or about March 25th, 1994, David A Kessler, the FDA Commissioner, presented to the Congressional Sub Committee on Health and the Environment that the TOBACCO INDUSTRY had intentionally sold cigarettes containing an addictive level of nicotine. The Defendants intentionally manipulated the levels of nicotine in cigarettes so as to addict plaintiff and the consuming public.

43. On or about March 25th, 1994, Charles O. Whitley, representing the TOBACCO INSTITUTE testified before the United States Congress under oath and stated "Nicotine levels are a function of tar levels. When tar levels are set, nicotine levels follow. As manufacturers have reduced tar levels and yields over the years to satisfy changing consumer taste, nicotine levels in yields have fallen correspondingly."

44. On or about March 27th, 1994, Brennan Dawson, the Vice President of the Defendant TOBACCO INSTITUTE, appeared on a program produced by CBS News titled "Face the Nation" and stated as follows: "Some of the industry testimony that Mr. Waxman did not tell you about included statements from all six cigarette

manufacturers that not only do they not add nicotine, but they do not manipulate nicotine. So Congress has been told formally by every cigarette manufacturer in the United States that this claim is without foundation."

45. The TOBACCO INDUSTRY concealed information and suppressed all studies about the addictive nature of nicotine and intentionally manipulated the level of nicotine so as to keep smokers of their product addicted, instead, the TOBACCO INDUSTRY stressed "free choice" and "smoker's rights" in its advertising campaign, yet it eliminated any free choice for consumers.

46. During a period in excess of forty years, the TOBACCO INDUSTRY misrepresented its product and emphasized that cigarettes were good for smokers. The TOBACCO INDUSTRY has also misrepresented through their advertising campaign that the COUNCIL FOR TOBACCO RESEARCH-U.S.A. was and is an independent, objective, scientific body created for the purpose of disseminating factual information about the relationship between smoking and health while the truth is and was at all relevant times that the COUNCIL FOR TOBACCO RESEARCH-U.S.A. was an agent of and on behalf of the TOBACCO INDUSTRY, whose true purpose was to conceal any data that linked cigarette smoking to disease and death. The TOBACCO INDUSTRY has used the same argument for a period in excess of forty years to sell cigarettes at all costs.

47. On or about October 15th, 1999, Plaintiff discovered that he did not possess the ability to stop smoking because he is addicted to nicotine, through the intentional acts of the TOBACCO INDUSTRY and that tobacco is not a habit but rather an addiction. Plaintiff cannot legislate and/or ban cigarettes; he can and is seeking redress for the injuries he has sustained.

48. The TOBACCO INDUSTRY have included merchandise campaigns, such as "Joe Camel", "Marlboro Country Store", "Save the Miles, Get the Gear", to manipulate young adults through their manipulated advertising campaigns of deception to smoke. One of the TOBACCO INDUSTRY'S most recent brilliant deception is an advertisement on national television for young adults in a campaign called "We Card", applying reverse psychology to encourage young adults to use "fake identifications" to

obtain the product of tobacco and cigarettes, sponsored by Defendants PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC.

49. The overwhelming scientific and medical evidence confirms that tobacco additives as well as cigarette smoke, contain many carcinogens and are toxic to humans. Cigarette smoking is a substantial contributing force, if not the predominant factor, in the development of lung cancer, other cancers, heart disease, strokes, impairment to lungs and other diseases.

50. Since at least 1946, the cigarette defendants have known that tobacco product is the predominant factor in the development of cancers, heart disease, impairment to lungs and other diseases. Defendants Cigarette Manufacturers have known about the carcinogenic and toxic properties of cigarettes and they have intentionally conspired to mislead, deceive and confuse plaintiff, the consuming public, and the United States government concerning: (a) the harmful and debilitating effects smoking has on the health of individuals; (b) that nicotine in cigarettes is a powerful, addictive substance; and (c) that defendants intentionally manipulated levels of nicotine delivery in cigarettes to ensure that smokers remain addicted and continue to buy their product.

51. Since the 1950's, the TOBACCO INDUSTRY publicly promised to lead the effort to discover and disclose the truth about smoking and health. Instead, they systematically suppressed and concealed material information and waged an aggressive campaign of disinformation about the health consequences of smoking. Defendants have known for years, based on their own independent research, that their products would injure and/or kill the consumer when used as directed. Defendants continue to this day to deny and conceal the facts that smoking causes cancers, impairment to lungs and other diseases and that nicotine is addictive and that they intentionally tampered with the levels of nicotine.

52. Many of the most well-educated and highly respected people in our community have fallen victims to the TOBACCO INDUSTRY'S manipulation and untrue representations, including but not limited to, Presidents, Supreme Court Justices, and Physicians among many others.

They are all addicted to nicotine and have no choice in the matter.

53. Tolling of Applicable Statutes of Limitation: Any applicable statute of limitation have been tolled by Defendants' affirmative and intentional acts of fraudulent concealment, suppression and denial of the facts as alleged. Defendants fraudulent concealment included intentionally covering up and refusing to disclose internal documents, suppressing and subverting medical and scientific research, and failing to disclose and suppressing information concerning the health consequences of smoking, the addictive properties of nicotine and the Defendant cigarette manufacturers' manipulation of the level of nicotine yield in their cigarettes to addict Plaintiff and consumers. Through such acts of fraudulent concealment, Defendants have successfully concealed from Plaintiff the truth about the health consequences from smoking, the addictive nature of cigarettes and the Defendant cigarette manufacturers' manipulation of nicotine yield level in their cigarettes, thereby tolling the running of any applicable statute of limitation. Plaintiff could not reasonably have discovered the true facts until very recently, the truth having been fraudulently and knowingly concealed by Defendants for years. In the alternative, Defendants are estopped from relying on any statutes of limitation because of their fraudulent concealment of the health consequences of smoking, the addictive nature of nicotine and the Defendant cigarette manufacturers' manipulation of nicotine yield levels in their cigarettes. Defendant cigarette manufacturers were under a duty to disclose their manipulation of nicotine levels in cigarettes because this is nonpublic information over which such Defendants has exclusive control, because such Defendants knew this information was not available to Plaintiff, and because this information was crucial to the consuming public in making informed purchasing decisions. Until very recently, Plaintiff had no knowledge that Defendants were engaged in much of the wrongdoing alleged. Because of the fraudulent and active concealment of the wrongdoing by Defendants, including deliberate efforts, which continue to this day, to give Plaintiff the materially false impression that there are no negative health

consequences to smoking cigarettes, that cigarettes do not cause cancer, impairment to the lungs and other disease, the nicotine is not addictive and that Defendant cigarette manufacturers are not manipulating the nicotine levels and delivery in their cigarettes, Plaintiff could not reasonably have discovered the wrongdoing any time prior to this time. Defendants have attempted and are continuing their attempts to keep such internal information from reaching Plaintiff. Defendants still refuse to admit, and continue to conceal, the fact that smoking defendants' cigarettes causes disease and that nicotine in defendants' cigarettes is addictive. The cigarette manufacturers still refuse to admit that they have manipulated the level and delivery of nicotine in their cigarettes.

**FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS EXCEPT COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., AND TOBACCO INSTITUTE, INC.**

**STRICT LIABILITY**

As a first, separate and distinct cause of action, Plaintiff, MAHER W. SOLIMAN, complains against said Defendants and each of them, and for a cause of action alleges as follows:

54. Plaintiff incorporates by reference paragraphs 1 through 53, inclusive, as though fully set forth herein.

55. Defendants PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC. ("PMC"), R.J. REYNOLDS TOBACCO COMPANY ("RJR"), BROWN & WILLIAMSON TOBACCO CORPORATION ("B&W"), B.A.T INDUSTRIES, PLC ("BAT"), AMERICAN TOBACCO COMPANY ("ATC"), LORILLARD TOBACCO COMPANY ("LORILLARD"), LIGGETT GROUP, INC.

("LIGGETT") and DOES 6 THROUGH 50, INCLUSIVE are the manufacturers and distributors of tobacco products, including, but not limited to, Camel, Marlboro King Size Cigarettes and Marlboro 100's Cigarettes, which were unreasonably dangerous products at the time they left Defendants' possession because they contained the chemical substance nicotine.

56. Said Defendants manufactured, distributed and sold their defective products of tobacco after manipulating the levels of nicotine so as to addict the consuming public at large. These defective products were sold to retailers, who sold said Defendants' defective tobacco products to Plaintiff.

57. Said Defendants engaged in a conduct which amounted to manipulating the levels of nicotine so as to addict the consuming public for their own personal gain in profits. The cigarettes containing manipulated levels of nicotine were manufactured, distributed and sold by these Defendants and were expected to and did reach the ultimate user or the consuming public at large without any changes in the product as manufactured, manipulated and sold by said Defendants.

58. Said Defendants manufactured the tobacco cigarettes in an unreasonably dangerous condition in that the cigarettes slowly inflict poison on the user and the addictive substance of nicotine, so that, it caused the user to be addicted to the nicotine contained within the cigarettes.

59. Plaintiff consumed the tobacco product as directed by the Defendants who manufactured it and in the manner in which was intended for use causing him to become addicted to the substance of nicotine.

60. The tobacco product was manufactured, distributed and sold by said Defendants in a defective and unreasonably dangerous condition. Defendants failed to design, manufacture, distribute and sell an alternative safer cigarette that would not addict Plaintiff and the consuming public at large and a safer alternative design for cigarettes was available at all times. Defendants failed to warn Plaintiff and the public at large that their product is addictive if used as directed and that the user will suffer inability to stop smoking the tobacco product. Furthermore, Defendants herein failed to warn Plaintiff and the

consuming public at large that they have manipulated the levels of nicotine to cause addiction to cigarettes and tobacco products.

61. As a direct and proximate result of consuming Defendants' product, Plaintiff suffered and continues to suffer addiction to the chemical substance nicotine contained in tobacco product, impairment to lung function known as "dyspnea", inability to breath except in an upright position known as "orthopnea", damage to his lungs, premature aging to his lungs, difficulty breathing laying down, chest pain, physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep, all to his damages in an amount which is not fully ascertained but within the jurisdiction of this Court, according to proof at trial.

WHEREFORE, Plaintiff seeks relief as set forth below.

**FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS EXCEPT COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., AND TOBACCO INSTITUTE, INC.**

**NEGLIGENCE**

As a second, separate and distinct cause of action, Plaintiff, MAHER W. SOLIMAN, complains against said Defendants and each of them, and for a cause of action alleges as follows:

62. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 61, inclusive as though fully set forth herein.

63. At all relevant times mentioned herein Defendants PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC. ("PMC"), R.J. REYNOLDS TOBACCO COMPANY ("RJR"), BROWN & WILLIAMSON TOBACCO CORPORATION ("B&W"), B.A.T INDUSTRIES, PLC ("BAT"), AMERICAN TOBACCO COMPANY ("ATC"), LORILLARD TOBACCO COMPANY ("LORILLARD"), LIGGETT GROUP, INC. ("LIGGETT") and DOES 6 THROUGH 50, INCLUSIVE , knew or should have known that the chemical substance of nicotine was addictive and that by

manipulating the levels of nicotine in cigarettes, Plaintiff as well as the consuming public at large, will become addicted. Plaintiff became and remains addicted to cigarettes.

64. The law imposes a duty on said Defendants to design a reasonably safe cigarette and to manufacture reasonably safe cigarettes and to warn Plaintiff and the consuming public at large of the addictive nature of nicotine in cigarettes.

65. At all relevant times mentioned herein, said Defendants knew or should have known that their tobacco product and cigarettes were inherently defective, unreasonably dangerous, deleterious, poisonous, and addictive.

66. At all relevant times mentioned herein, Plaintiff did not know, and could not have known through the exercise of reasonable care and diligence that Defendants were intentionally manipulating the levels of nicotine so as to cause him to become hopelessly addicted to cigarettes.

67. Said Defendants herein breached the duty the law imposes upon them, they breached their duty of reasonable care towards Plaintiff herein by failing to design and manufacture products that were not addictive; Failing to design and manufacture tobacco products that did not contain manipulated levels of nicotine; Failing to warn Plaintiff and the consuming public at large of the addictive nature of the chemical substance nicotine; Failing to take any reasonable measures to reduce or remove the chemical substance nicotine in cigarettes so that Plaintiff as well as the consuming public at large would have the ability to stop smoking; Failing to design a safer product that at all relevant times mentioned herein was available to Defendants, so that smokers could purchase a nicotine-free cigarette; Failing to inform Plaintiff and the consuming public at large with information known to them regarding health risks and disease caused by the consumption of the tobacco product and cigarettes and the addictive nature of the chemical substance nicotine; and failing to remove and/or recall the tobacco products from their marketplace upon learning that tobacco products and cigarettes were addictive and the direct cause of serious illness and death.

68. As a direct and proximate result of the negligence and aforementioned carelessness of Defendants

as herein alleged, Plaintiff suffered and continues to suffer addiction to the chemical substance nicotine contained in tobacco product, impairment to lung function known as "dyspnea", inability to breath except in an upright position known as "orthopnea", damage to his lungs, premature aging to his lungs, difficulty breathing laying down, chest pain, physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep, all to his damages in an amount which is not fully ascertained but within the jurisdiction of this Court, according to proof at trial.

**FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS EXCEPT COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., AND TOBACCO INSTITUTE, INC.**

**BREACH OF EXPRESS WARRANTY**

As a third, separate and distinct cause of action, Plaintiff, MAHER W. SOLIMAN, complains against said Defendants and each of them, and for a cause of action alleges as follows:

69. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 68, inclusive as though fully set forth herein.

70. Defendants PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC. ("PMC"), R.J. REYNOLDS TOBACCO COMPANY ("RJR"), BROWN & WILLIAMSON TOBACCO CORPORATION ("B&W"), B.A.T INDUSTRIES, PLC ("BAT"), AMERICAN TOBACCO COMPANY ("ATC"), LORILLARD TOBACCO COMPANY ("LORILLARD"), LIGGETT GROUP, INC. ("LIGGETT") and DOES 6 THROUGH 50, INCLUSIVE, designed, manufactured, packaged, distributed, merchandised, promoted, advertised and supplied the chemical substance of nicotine in their tobacco products that were sold to the Plaintiff herein.

71. Said Defendants expressly warranted to the Plaintiff as well as the consuming public at large the following:

a. Defendants' cigarettes were not addictive;

b. Defendants did not manipulate the levels of nicotine in their tobacco products or cigarettes;

c. Defendants did not intend to addict Plaintiff or the consuming public at large; and

d. Defendants warranted that their product of cigarettes contained specified levels of tar and nicotine. Said Defendants provided inaccurate measurement devices in order to provide inaccurate calculations to the levels of tar and nicotine, and was represented to the Plaintiff and other consuming public at large.

72. Said Defendants breached their express warranties by offering for sale and selling their tobacco products and cigarettes as non-addictive while in fact their tobacco products and cigarettes were addictive and contained levels of nicotine manipulated by said Defendants with the intent to cause Plaintiff and the public at large addiction to their defective tobacco products and cigarettes.

73. The above-referenced express warranties by said Defendants were in fact false and untrue at the time they were made and Defendants knew that the chemical substance of nicotine in cigarettes was addictive to Plaintiff and the consuming public at large and the disclosed levels of tar and nicotine on their cigarette packages and advertising was untrue or inaccurate.

74. The breach of the express warranties by Defendants caused Plaintiff to become an addict to the chemical substance of nicotine and impairment to lung function among other injuries. Plaintiff has relied on the promotion, representations, judgment and express warranties of said Defendants in purchasing cigarettes.

75. The breach of express warranties by said

Defendants entitles Plaintiff to recover compensatory damages and other damages provided under California law.

WHEREFORE, Plaintiff seeks relief as set forth below.

**FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS EXCEPT COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., AND TOBACCO INSTITUTE, INC.**

**BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS**

As a fourth, separate and distinct cause of action, Plaintiff, MAHER W. SOLIMAN, complains against said Defendants and each of them, and for a cause of action alleges as follows:

76. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 75, inclusive as though fully set forth herein.

77. Said Defendants manufactured, distributed and sold defective products of tobacco which the Plaintiff purchased and consumed and became addicted to, as the products as sold were addictive, unmerchantable, and unfit for consumption or use when sold. The product as sold subjected Plaintiff to addiction and other serious injuries.

78. Prior to 1969 and at times material, the CIGARETTE MANUFACTURERS conducted an aggressive marketing, promotional and advertising campaign intended to induce foreseeable users, specifically younger users, to purchase their cigarettes. The marketing and advertising of said defendants occurred in printed communications, on television, radio, on billboards and by other means of communication.

79. Post-1969, the cigarette manufacturers issued informational literature, coupons referenced as gifts, other writings and inducements intended to induce foreseeable users, specifically younger users, to consume and purchase their cigarettes.

80. Plaintiff consumed defendants product of cigarettes in the intended manner and without any change.

81. Plaintiff was induced to purchase the cigarettes prior to 1969 through their promotional advertisings and at

all times material herein after 1969 by cigarette manufacturers' marketing, public statements, informational communications, sponsorship of athletic events, concerts, and other activities, including, but not limited to, coupons for gifts and other efforts.

82. At all relevant times herein, prior to 1969 and post-1969, defendants in furthering the selling of their products, implied that their cigarettes can be smoked and enjoyed without worry over health concerns when in fact defendants knew of the health hazards of using cigarettes and other tobacco products and actively concealed the results of research and other information that demonstrates the danger of using cigarettes and other tobacco products. Defendants knew that their product was defective because they tampered with the levels of nicotine and made the product addictive and unsafe for consumption and acted to enhance the danger of their product.

83. At all relevant times herein, cigarette manufacturers knew, or in the exercise of reasonable care, should have known, that their product was a health hazard when used as intended; that their product will lead to addiction or dependency when used as intended; that switching to the so-called "light" cigarette would not be less hazardous because the addicted consumer would smoke more to compensate for the decreased dosage of nicotine; that the FTC method of measuring "tar and nicotine" levels underestimates the actual levels of nicotine delivered; that adding ammonia, or altering the PH of the tobacco, enhanced the delivery of nicotine, thereby increasing addiction and/or dependency; and that there were feasible improvements in design, composition, or manufacture of cigarettes such as to materially decrease the foreseeable risk to user by marketing a "safer" cigarette that at all relevant times mentioned herein was available.

84. The CIGARETTE MANUFACTURERS, manufactured, distributed, tested, designed, packaged, sold and/or placed into the stream of commerce, in the course of business, numerous brands of defective cigarettes.

85. The CIGARETTE MANUFACTURERS, and each of them, expressly and impliedly represented to the public at large, including plaintiff, purchasers, users and bystanders, that cigarettes and tobacco products were of

merchantable quality, and safe for the use for which they were intended. The CIGARETTE MANUFACTURERS accomplished these representations and induced the consuming public, including plaintiff, and government to rely thereon through an aggressive and continuing campaign up to 1969 of deceptive, erroneous, misleading and false advertisements in the press, including but not limited to, print, radio, television media and cinema designed to conceal the true health hazards and addictive nature of cigarettes and to attract new younger users to replace the older ones who died.

86. After 1969, the CIGARETTE MANUFACTURERS continued to disseminate deceptive, erroneous, misleading, and false statements concerning the health hazards and the addictive nature of smoking and concerning health and disease caused by smoking and continue to attract younger smokers to replace the older ones who died as a result to the informational communications, the dissemination of coupons and gifts, the underwriting of sports, concerts and the "underwriting" of purportedly scientific research and studies.

87. Defendants represented that they would undertake a special responsibility and duty to the public, including plaintiff, to accept an interest in the public's health, including plaintiff, as a basic and a paramount responsibility; to cooperate closely with those who safeguard the public health; to aid and assist the research effort into all aspects of tobacco use and human health; to continue to research and otherwise undertake all possible efforts to learn all the facts and to discover the truth about smoking and health; and finally to disclose to the public, including plaintiff, complete and accurate information about the effects of cigarette smoking on human health.

88. The affirmations, as well as the extensive advertising of the industry, became the basis of the bargain for the public, including plaintiff, to use tobacco or continuing to use tobacco.

89. Defendants have breached and continue to breach their special responsibility and duty by failing to exercise reasonable care to protect their undertaking. Defendants' failure to use due care in performing the duty that they voluntarily undertook to perform, has increased

the risk of harm to the public, including plaintiff. Defendants have not publicly retracted or otherwise withdrawn from their undertaking, or otherwise informed the public, including plaintiff, that it could no longer rely on the defendants' performance of their special responsibility and duty.

90. Plaintiff relied, to his detriment, upon the representations made by the CIGARETTE MANUFACTURERS in countless pre-1969 advertisements and promotional activities. Plaintiff also relied, to his detriment, upon the post-1969 dissemination of free cigarettes, free gifts, and informational communications aimed at the consuming public, including plaintiff and the United States Government.

91. Defendants' products are unmerchantable and are unfit for safe use when sold and consumed as intended. Defendants have breached their implied warranty of merchantability because their products are not fit for their intended purposes. Further, defendants knew their tobacco products were unfit for use as intended.

92. The aforementioned pre-1969 representations by CIGARETTE MANUFACTURERS and each of them, and post-1969 commitments to safety and safe products, were false and untrue, in that cigarettes and other tobacco products were not safe for consumption and for intended use and they were not of merchantable quality as represented by defendants, and each of them, in that cigarettes and tobacco products have very dangerous properties and defects whereby said products cause lung cancer, other cancers, impairment to lung function, heart disease, and many other diseases. Said products include other defects that cause injury and damage to the users of said products, including plaintiff herein, as well as the by-standards to those users.

93. On or about January 26th, 2000, plaintiff was diagnosed with a smoking-related illness.

94. As a direct and proximate result of consuming Defendants' product, Plaintiff suffered and continues to suffer addiction to the chemical substance nicotine contained in tobacco product, impairment to lung function known as "dyspnea", inability to breath except in an upright position known as "orthopnea", damage to his

lungs, premature aging to his lungs, difficulty breathing laying down, chest pain, physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep, all to his damages in an amount which is not fully ascertained but within the jurisdiction of this Court, according to proof at trial.

WHEREFORE, Plaintiff seeks relief as set forth below.

**FOR A FIFTH CAUSE OF ACTION**
**AGAINST ALL DEFENDANTS**

**FRAUD**

As a fifth, separate and distinct cause of action, Plaintiff, MAHER W. SOLIMAN, complains against said Defendants and each of them, and for a cause of action alleges as follows:

95. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 94, inclusive as though fully set forth herein.

96. Said Defendants launched a campaign of deception to promote their defective tobacco products while concealing the scientific data which they possessed from Plaintiff and the consuming public at large. The scientific data Defendants possessed established that nicotine was addictive and linked cigarette smoking with cancer, emphysema and other serious illnesses.

97. At all relevant times mentioned herein Defendants concealed all the material and relevant facts from Plaintiff to make an informed decision with regard to the consumption of their defective tobacco products. Defendants omitted from Plaintiff the relevant material information such as, nicotine is an addictive chemical substance; and that the TOBACCO INDUSTRY manipulates nicotine levels in their tobacco products with the intent to addict Plaintiff and the consuming public at large.

98. Defendants have concealed and suppressed all the aforementioned facts pertaining to the defective and addictive nature of the tobacco product from Plaintiff and the consuming public at large and from government agencies, including but not limited to, United States Congress, whose

function is to police the conduct of the TOBACCO INDUSTRY. Plaintiff was not aware and could not, by the exercise of reasonable care and diligence, have discovered the true addictive nature of the tobacco products he has consumed nor could he have discovered that said Defendants manipulated the levels of nicotine in these tobacco products. Furthermore, Plaintiff was not and could not have discovered by the exercise of reasonable care and diligence, that Defendants herein intended to addict him to their defective product.

99. Defendant COUNCIL FOR TOBACCO RESEARCH-U.S.A. and Defendant TOBACCO INSTITUTE, intentionally represented themselves as unbiased and objective entities that gathered data regarding the tobacco products and cigarettes, while in fact, both Defendants, COUNCIL FOR TOBACCO RESEARCH-U.S.A. and TOBACCO INSTITUTE, INC. have concealed their data and distorted the truth regarding the addictive nature of tobacco and the danger to health from smoking.

100. Defendants had a duty under the law to disclose to Plaintiff and the consuming public at large all the facts outlined above pertaining to the defective and addictive nature of their tobacco products. Despite its duty to disclose the material facts set forth in this Complaint, Defendants actively concealed and suppressed those facts with the intent of defrauding Plaintiff and the consuming public at large. Plaintiff was unaware of those facts, and would not have acted as he did by consuming their product and would have made an informed decision if he had known of the facts which Defendants actively concealed and suppressed.

101. This cause of action arises out of an ongoing conspiracy by the leading CIGARETTE MANUFACTURERS and their TRADE ASSOCIATIONS, which together control the TOBACCO INDUSTRY, which is responsible for the health consequences of smoking.

102. The health consequences of smoking is the human tragedy of smoking-related disease and which is enormous. Cigarette smoking is the leading cause of premature death in the United States. According to the Federal Centers of Disease Control and Prevention, each year cigarette smoking kills more than 400,000 Americans,

exceeding the combined deaths caused by automobile accidents, AIDS, alcohol use, use of illegal drugs, homicide, suicide and fires.

103. There is an excess of forty chemicals in the smoke inhaled by persons using defendants CIGARETTE MANUFACTURERS' products determined to be carcinogenic. Cigarette smoking causes more than 85% of all lung cancer and also linked to cancers of the mouth, larynx, stomach, pancreas, kidney and colon, among others. Cigarette smoking is also responsible for impairment of lung function.

104. Smoking is also responsible for thousands of deaths from cardiovascular disease, including stroke, heart attack, and linked to a large number of other serious illnesses.

105. The nicotine in cigarettes is recognized as an addictive substance by such major medical organizations as the Office of the U.S. Surgeon General, the World Health Organization, the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Society of Addiction Medicine, and the Medical Research Council in United Kingdom. All of these organizations acknowledge tobacco use as a form of drug dependency or addiction with severe adverse health consequences.

106. Despite a substantial body of evidence, including evidence developed by the CIGARETTE MANUFACTURERS themselves, dating back at least forty years, indicating that nicotine is addictive and is the main reason why people smoke and continue to smoke, the Chief Executives of CIGARETTE MANUFACTURERS, in 1994, testified under oath before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, U.S. House of Representatives, chaired by Congressman Waxman ("Waxman Subcommittee"), and knowingly made material representations and omissions to the Waxman Subcommittee about smoking, health and addiction, and in particular, stated that nicotine is not addictive. These statements were made with the knowledge that they would be communicated to the consuming public, including plaintiff. The testimony of these defendants to the Waxman Subcommittee, included but was not limited to, the

following:

a. Andrew Tisch, CEO of Lorillard, asserted: "We have looked at the data and the data that we have been able to see has all been statistical data that has not convinced me that smoking causes death."

b. William I. Campbell, CEO of Philip Morris, asserted: "Philip Morris does not manipulate nor independently control the level of nicotine in our products"..... "Cigarette smoking is not addictive."..... "Philip Morris research does not establish that smoking is addictive."

c. James W. Johnston, CEO of RJ Reynolds, asserted: "Smoking is no more addictive than coffee, tea or Twinkies."

107. The CIGARETTE MANUFACTURERS continue to deny that nicotine is addictive and instead use various misleading euphemisms to describe the role of nicotine, such as "satisfaction," "impact", "strength", "rich aroma" and "pleasure". Nonetheless, there is widespread agreement in the medical and scientific communities that the primary, if not sole, function of nicotine is to provide a pharmacological effect on the smoker that leads to addiction.

108. The CIGARETTE MANUFACTURERS are one of the most profitable industries in the United States. The unusual concentrated and highly profitable nature of the CIGARETTE MANUFACTURERS has facilitated the planning, implementation and funding of a decades-long conspiracy by the CIGARETTE MANUFACTURERS and their TRADE ASSOCIATIONS relating to the issues of smoking, health and addiction.

109. The CIGARETTE MANUFACTURERS have pursued a conspiracy of deceit and misrepresentation against the public, including plaintiff, designed to protect cigarette sales. The means by which the CIGARETTE MANUFACTURERS carried out their conspiracy were twofold:

a. They agreed falsely to represent to the public,

including plaintiff, that questions about smoking and health would be answered by a new unbiased, and trustworthy source; and

b. They counted on the resulting public trust to more effectively misrepresent, suppress and confuse the facts about the health dangers of smoking and addiction.

The CIGARETTE MANUFACTURERS set their plan in motion by creating a joint industry research organization in 1954. Since that time, they have used the credibility gained by claims of disinterested industry funded research better to misrepresent the material facts to the public. In what has become the industry "mantra", CIGARETTE MANUFACTURERS' claim that there is insufficient "objective" research to determine if cigarette smoking causes disease, and that cigarettes are not addictive.

110. The TOBACCO INDUSTRY'S internal research confirmed the dangers of smoking and addiction, their fraud and deception rose to a new level when they concealed their own negative health and addiction research results from both, the public, including plaintiff, and public health officials. These research results have still not been voluntarily released.

111. The CIGARETTE MANUFACTURERS have also not told the public that they tamper, manipulate and control the nicotine content and delivery of their products to create and sustain smokers' addiction to cigarettes.

112. The success of the industry's campaign of fraud, deceit and misinformation depended on the CIGARETTE MANUFACTURERS acting in concert. If one company broke ranks and told the public what it knew about the health consequences of cigarette smoking, or its addictive nature, the conspiracy would fail. Without the agreement of each CIGARETTE MANUFACTURERS to suppress the truth, the fraud and the deceptive claim that the joint industry research efforts were objective would be revealed, and the substantive claim that "not enough facts are known" to indict cigarette smoking as the cause of disease would ring hollow. The CIGARETTE MANUFACTURERS agreed to come together and to stay

together in order to accomplish what could not have otherwise occurred of unified and consistent distortion of public information on smoking, health and addiction.

113. The testimony of the CIGARETTE MANUFACTURERS before Congress in 1994, that smoking is not a proven cause of disease and death, and that nicotine is not addictive, is only one recent example of many of this ongoing pattern of deception and suppression that began more than forty years ago. The pattern of deception and suppression is as follows:

I. The joint industry response to the issue of smoking and disease (public and private);

II. The role of nicotine in smoking; and

III. The sales to minors.

**I. <u>The joint industry response to the issue of smoking and disease (public and private);</u>**

<u>"The Big Scare":</u>

114. On or about December, 1953, Dr. Ernest L. Wynder of the Sloan-Kettering Institute published the results of a study where he painted the shaved backs of mice with cigarette smoke condensate residue. Malignant tumors grew in 44% of the mice in Dr. Wynder's study, providing biological evidence that cigarette smoke caused cancer. The previous year, a British researcher, Dr. Richard Doll, published a statistical analysis showing that lung cancer was more common among people who smoked and that the risk of lung cancer was directly proportional to the number of cigarettes smoked. The widespread reporting of these studies caused what cigarette company officials later called "Big Scare".

115. The Cigarette Industry responded quickly to the mounting adverse publicity of a link between smoking and cancer. The Chief Executive Officers of the leading CIGARETTE MANUFACTURERS met on or about December 15th, 1953, at the Plaza Hotel in New York City. Also in attendance was the public relations firm of Hill and Knowlton, which was to play a central role in formulating

and executing the industry response.

116. According to Hill and Knowlton memorandum summarizing the meeting, Cigarette Industry Executives viewed the problem as "extremely serious and worthy of drastic action." The document continues, "officials stated that salesmen in the industry are frantically alarmed and that the decline in tobacco stocks on the stock exchange market has caused grave concern....".

117. The participants in the meeting agreed that a strong public relations response from the industry was necessary. From the beginning, the emerging research linking smoking and cancer was viewed by these defendants as a public relations problem, not a public health issue. According to the Hill and Knowlton memorandum summarizing the meeting:

a. The Chief Executive Officers of all the leading companies, except Liggett, "agreed to go along with a public relations program on the health issue".

b. "They are also emphatic in saying that the entire activity is a long-term, continuing program, since they feel that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future."

c. "The current plans are for Hill and Knowlton to serve as the operating agency of the companies, hiring all the staff and disbursing all funds."

118. Hill and Knowlton presented, nine days later, a detailed recommendation to the CIGARETTE MANUFACTURERS. The recommendation recognized the importance of gaining the public trust, and avoiding the appearance of bias, if the "pro-cigarette" industry strategy was to be successful. According to the memorandum:
"[T]he grave nature of a number of recently highly publicized research reports on the effects of cigarette smoking have confronted the industry wi h a serious problem of public relations.

It is important that the industry do nothing to appear in the light of being callous to considerations of health or of belittling medical research which goes against cigarettes.

The situation is one of extreme delicacy. There is much at stake and the industry group, in moving into the field of public relations, need to exercise great care not to add fuel to the flames."

119. As a result of the aforementioned meeting of which took place on or about December 15th, 1953, and the recommendations of Hill and Knowlton, five of the six CIGARETTE MANUFACTURERS agreed to create the Tobacco Industry Research Committee ("TIRC"). Liggett Group joined the industry trade group in 1964, the same year the Surgeon General issued his first report linking cigarette smoking to lung cancer. Also, in 1964, TIRC changed its name to the Council for Tobacco Research ("CTR"). A second trade group, the Tobacco Institute, was formed by CIGARETTE MANUFACTURERS in 1958.

120. As it was proposed at the aforementioned December 1953 meeting, the CIGARETTE MANUFACTURERS (except Liggett), through their agent Hill and Knowlton, operated, and effectively controlled TIRC.

121. TIRC was physically established in the Empire State Building in New York City, one floor below the Hill and Knowlton offices. Internal documents strongly suggest that Hill and Knowlton, and not independent scientists, actually ran TIRC. A "highly confidential" internal memo

reported:
"Since the [TIRC] had no headquarters and no staff, Hill and Knowlton, Inc. was asked to provide a working staff and temporary office space. As a first organizational step, public relations counsel assigned one of its experienced executives, W.T. Hoyt, to serve as account executive and handle as one of his functions the duties of executive secretary for the [TIRC]."

In 1954, thirty-five staff members of Hill & Knowlton worked full or part-time for TIRC.

The Industry Undertake a Special Duty Regarding Smoking and Health

122. The CIGARETTE MANUFACTURERS made an unambiguous pledge to the public, including Plaintiff, through TIRC that they would conduct and report objective and unbiased research regarding smoking and health. When they made this representation, defendants knew or should have known that the consuming public, including plaintiff, would consider the representation material to his decision to purchase and smoke cigarettes. At all relevant times mentioned herein and continuing to the present, defendants, and each of them knew or should have known that their failure to fulfill the duty they undertook, and other conduct as alleged herein would result to injury to the consuming public and to the plaintiff.

123. On January 4th, 1954, defendants announced the formation and purpose of TIRC, with a full page newspaper advertisement entitled "A Frank Statement to Cigarette Smokers", the statement stated in part:

a. "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings."

b. "Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research."

c. "[T]here is no proof that cigarette smoking is one of the causes [of lung cancer]."

d. "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

e. "We believe the products we make are not injurious to health."

f. "We always have and always will cooperate closely with those whose task it is to safeguard the public health."

g. "We are pledging aid and assistance to the research effort into all phases of tobacco use and health."

h. "For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE."

i. "In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities."

j. "This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it."

124. On or about early 1955, the Tobacco Industry celebrated the successful self-defense strategy they implemented through the "Frank Statement" as recommended by Hill and Knowlton. Hill and Knowlton reported to TIRC:

a. "[P]rogress has been made....The first 'big scare' continues on the wane."

b. "The research program of the [TIRC] has won wide acceptance in the scientific world as a sincere, valuable and scientific effort."

c. "Positive stories are on the ascendancy."

Tobacco Industry Possessed the Knowledge that Smoking Is Harmful

125. Prior to the representation of the "Frank Statement" which stated "there is no proof that cigarette smoking is one of the causes" of lung cancer, a Lorillard chemist H.B. Parmele, who became Vice President of Research and a member of Lorillard's Board of Directors reported to the contrary. Mr. Parmele wrote to the company's manufacturing committee: "Certain scientists and medical authorities have claimed for many years that the use of tobacco contributes to cancer development in susceptible people. Just enough evidence has been presented to justify the possibility of such a presumption."

126. After the "Frank Statement", and continuing to the present, the TOBACCO INDUSTRY have repeatedly acted in breach of their assumed duty to report objective facts on Smoking and Health. When independent studies represented mounting evidence that cigarette smoking causes cancer, impairment to lung function and other diseases, the CIGARETTE MANUFACTURERS and their TRADE ASSOCIATIONS continued publicly to represent that nothing was proven against smoking while their internal documents show the truth to the contrary. The CIGARETTE MANUFACTURERS knew and acknowledged internally the scientific evidence of the health hazards of smoking, and at the same time suppressed such evidence at every opportunity they had, and attacked it when it did appear. Some of many examples of the internal TOBACCO INDUSTRY documents reveal as follows:

a. A 1956 memorandum from the Vice President of Philip Morris' Research and Development Department to top executives at the company regarding the advantages of "ventilated cigarettes" stated that: "Decreased carbon monoxide and nicotine are related to decreased harm to the circulatory system as a result of smoking.....decreased irritation is desirable.....as a partial elimination of a potential cancer hazard."

b. A 1958 memorandum sent to the Vice President of

Research at Philip Morris, who later became a member of its Board of Directors, from a company researched stated "the evidence...is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors....."

c. A 1961 document presented to the Philip Morris Research and Development Committee by the company's Vice President of Research and Development included a section entitled "Reduction of Carcinogens in Smoke." The document stated, in part:
"To achieve this objective will require a major research effort, because
-Carcinogens are found in practically every class of compounds in smoke.
This fact prohibits complete solution of the problem by eliminating one or two classes of compounds.
The best we can hope for is to reduce a particularly bad class, i.e., the polynuclear hydrocarbons, or phenols.....
-Flavor substances and carcinogenic substances come from the same classes, in many instances."

d. A 1963 memorandum to Philip Morris' President and CEO from the company's Vice President of Research describes a number of classes of compounds in cigarette smoke which are "known carcinogens" The document goes on to describe the link between smoking and bronchitis and emphysema. "Irritation problems are now receiving greater attention because of the general medical belief that irritation leads to chronic bronchitis and emphysema. These are serious diseases involving millions of people. Emphysema is often fatal either directly or through other respiratory complications. A number of experts have predicted that the cigarette industry ultimately may be in greater trouble in this area than in the lung cancer field."

e. Brown & Williamson and its parent company, British American Tobacco Company ("BAT"), researched the health effects of nicotine and were aware early on, as reported at a B.A.T Group Research Conference in November 1970, that "nicotine may be implicated in the aetiology [cause] of cardiovascular disease....."

f. A 1961 "Confidential" memorandum from the consulting research firm hired by Liggett to do research for the company states:
"There are biologically active materials present in cigarette tobacco.
These are: (a)cancer causing
(b)cancer promoting
(c)poisonous
(d)stimulating, pleasurable, and flavorful."

g. A 1963 memorandum from the Liggett consulting research firm states: "Basically, we accept the inference of a causal relationship between the chemical properties of ingested tobacco smoke and the development of carcinoma, which is suggested by the statistical association shown in the studies of Doll and Hill, Horn and Dorn with some reservations and qualifications and even estimate by how much the incidence of cancer may possibly be reduced if the carcinogenic matter can be diminished, by an appropriate filter, by a given percentage."

127. Liggett's internal documents have sharply contrasted the information it provided to the Surgeon General in 1963. Liggett withheld from the Surgeon General the views of its researchers and consultants that the evidence showed cigarette smoking causes diseases. Instead, it focused on alternative causes of disease, such as air pollution, coffee, and alcohol consumption, diet, lack of exercise, and genetics. Liggett criticized the known statistical association between smoking and mortality and various diseases as "unreliably conducted" and "inadequately analyzed". The conclusion of the Liggett report that the association between smoking and disease was inconclusive, and was in fact due to other factors coincidentally associated with smoking.

128. Philip Morris also concealed from the public its actual views of the research conducted outside the influence of the industry. In a 1971 memorandum by Dr. H. Wakeham, then Vice President of Research and Development, referring to a recent study which found cigarette smoke inhalation caused lung cancer in beagles,

stated, "1970 might very properly be called the year of the beagle. Earl in the ear, the American Cancer Society announced that they had finally demonstrated the formation of lung cancer in beagles by smoke inhalation in the now infamous Auerbach and Hammond study." Although Dr. Wakeham criticized the mice cancer studies, he conceded that "the beagle test was a critical one....for the cigarette causation hypothesis."

Dr. Wakeham's memorandum demonstrates Philip Morris' approval of the industry's public dismissals of these independent studies; "The strong opposition of the industry to the beagle test is indicative of a new, more aggressive stance on the part of the industry in the smoking and health controversy. We have gone over from what I have called the 'vigorous denial' approach, the take it on the chin and keep quiet attitude, to the strongly voiced opposition and criticism. I personally think this counter-propaganda is a better stance than the former one."

129. Also, B.A.T.'s internal view of the validity of mouse skin painting experiments remarkably differed from the view expressed in public statements. Minutes from a 1969 B.A.T. research conference stated as follows: "[h]istorically, bioassay experiments were undertaken by the industry with the object of clarifying the role of smoke constituents in pulmonary carcinogenesis. The most widely used of these methods [was] mouse-skin painting.....(a) IN the foreseeable future, say five years, mouse-skin painting would remain as the ultimate court of appeal on carcinogenic effects." Two years later a Brown & Williamson public relations document stated that "[m]uch of the experimental work involves mouse-painting or animal smoke inhalation experiments.....[T]he results obtained on the skin of mice should not be extrapolated to the lung tissue of the mouse, or to any other animal species. Certainly such skin results should not be extrapolated to the human lung."

Tobacco Industry Continue to Repeat to the Public its False Promises

130. The deceptions of the 1954 "Frank Statement to Cigarette Smokers" were renewed and repeated by the industry. RJR Chairman Bowman Gray testified before

Congress in 1964 and stated: "If it is proven that cigarettes are harmful, we want to do something about it regardless of what somebody else tells us to do. And we would do our level best. It's only human."

131. Another advertisement cosponsored by TIRC and the Tobacco Institute called "A Statement about Tobacco and Health," stated:

"We recognize that we have a special responsibility to the public-- to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use. We accepted this responsibility in 1954 by establishing the TIRC, which provides research grants to independent scientists. We pledge continued support of this program of research until the facts are known."

"We shall continue all possible efforts to bring the facts to light."

132. Additional representations were made in 1970 when the cigarette industry through its lobbying group, the Tobacco Institute, placed a number of advertisements similar to the 1954 "Frank Statement." One advertisement stated in part:

a. "After millions of dollars and over 20 years of research: The question about smoking and health is still a question."

b. "In the interest of absolute objectivity, the tobacco industry has supported totally independent research efforts with completely non-restrictive funding."

c. "In 1954, the Industry established what is now known as CTR, the Council for Tobacco Research--USA, to provide financial support for research by independent scientists into all phases of tobacco use and health. Completely autonomous, CTR's research activity is directed by a board of ten scientists and physicians who retain their affiliations with their respective universities and institutions. This board has full authority and responsibility for policy, development and direction of the research effort."

d. "The findings are not secret."

133. Another advertisement in 1970 stated that the industry "believes the American public is entitled to

complete, authenticated information about cigarette smoking and health....the tobacco industry recognized and accepts a responsibility to promote the progress of independent scientific research in the field of tobacco and health."

134. In 1972, Tobacco Institute President Horace Kornegay, testifying before Congress, stated that "the cigarette industry is as vitally concerned or more so than any other group in determining whether cigarette smoking causes human disease...That is why the entire tobacco industry...since 1954 has committed a total of $40 million for smoking and health research through grants to independent scientists and institutions."

135. In March of 1983, Sheldon Sommers, MD, scientific director of CTR, testified before Congress that "[c]igarette smoking has not been scientifically established to be a cause of chronic diseases, such as cancer, cardiovascular disease, or emphysema. Nor has it been shown to affect pregnancy outcome adversely."

136. In 1984, RJR placed an advertisement in the New York Times stating that "[s]tudies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary."

137. In response to what he described as "a number of charges....leveled against the tobacco industry generally, and Philip Morris specifically," William Campbell, President of Philip Morris, told the Waxman Subcommittee in April 1994:

"....our consumers are being misled and when that happens Philip Morris has and will continue to speak out loudly and clearly. Our consumers deserve to know the truth....."

138. Each of the representations made by defendants to the consuming public, including plaintiff, with regard to sponsoring independent objective research and bringing the truth to light were false and deceptive. These representations were intended to gain the trust of the consuming public, including plaintiff, in order to better distort and suppress substantive information about Smoking and Health.

139. Plaintiff relied, to his detriment, upon the representations made by these defendants.

Tobacco Industry and the Gentleman's Agreement

140. CIGARETTE MANUFACTURERS and their TRADE ASSOCIATIONS depended for its success on a joint strategy and concerted effort. Each of the defendants agreed not to reveal to the public the true nature of TIRC/CTR and not to disclose adverse information on smoking, addiction and health, in order to maximize cigarette sales.

141. A 1968 memorandum addressed to the Chief Executive Officer of Liggett with regard to a meeting of the research directors of the six CIGARETTE MANUFACTURERS on the issue of smoking and health, stated as follows: "a general feeling that an industry approach as opposed to an individual company approach was highly desirable." Defendants further agreed to not perform research on smoking and health on their own. This agreement was referred to as "Gentleman's Agreement". A 1968 memorandum by Philip Morris entitled "Need for biological research by Philip Morris research and development," the memorandum was prepared by Philip Morris Vice President of Research and Development, stated in pertaining part as follows: "We have reason to believe that in spite of the gentlemans [sic] agreement for the tobacco industry in previous years that at least some of the major companies have been increasing biological studies with their own facilities." The memorandum further indicated that it was believed within the industry that individual companies were performing certain research on their own, in addition to the joint industry research, but the fundamental understanding and agreement remained intact and that harmful information and activities would be restrained, suppressed and concealed. This included restraining, concealing, and suppressing research on the health effects of smoking including the addictive qualities of cigarettes, and restraining, concealing and suppressing the research and marketing of safer cigarettes.

Suppression and Concealment of Industry-Sponsored Biological Research

142. The joint industry research efforts undertaking through TIRC/CTR were not disinterested or objective,

rather, they were designed and used to promote favorable research, to suppress negative research where possible, and to attack negative research where it could not be suppressed, all was designed to persuade the consuming public, including plaintiff, that the "case against smoking is not closed."

143. A 1974 report addressed to the Chief Executive Officer of Lorillard from a research executive described CTR's scientific projects as "hav[ing] not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc. Thus, it seems obvious that reviews of such programs for scientific relevance and merit in the smoking and health field are not likely to produce high ratings."

144. A 1972 internal document from a Tobacco Institute official to the group's President described the importance of using joint industry research to maintain public doubt about the link between smoking and disease:
"For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts--litigation, politics and public opinion.

While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not- nor was it ever intended to be - a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of

--creating doubt about the health charge without actually denying it

--advocating the public's right to smoke, without actually urging them to take up the practice

--encouraging objective scientific research as the only way to resolve the question of the health hazard"

"As an industry, therefore, we are committed to an ill-defined middle ground which is articulated by variations on the theme that, 'the case is not proved.'"

"In the cigarette controversy, the public--especially those who are present and potential supporters (e.g. tobacco state congressmen and heavy smokers)--must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor."

"As things stand, we supply them with too little in the way of ready-made credible alternatives."

145. A 1978 memo addressed to the CTR file from a Philip Morris official characterized CTR as "an industry 'shield'." The memorandum goes on to state:
"the 'public relations' value of CTR must be considered and continued...It is extremely important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed... There is a 'CTR basket' which must be maintained for 'PR' purposes...."

146. In 1993, a former 24-year employee of CTR confirmed publicly that the joint industry research efforts were not objective:
"When CTR researchers found out that cigarettes were bad and it was better not to smoke, we didn't publicize that."
"The CTR is just a lobbying thing. We were lobbying for cigarettes."

147. This and other evidence demonstrates that the role and purpose of TIRC and CTR in the cigarette manufacturers' strategy was to seek to use the public's trust to propagate "pro-cigarette" propaganda. An industry official wrote in his personal notes describing a meeting which included high level officials from various cigarette manufacturers that:
"CTR is best & cheapest insurance the tobacco industry can buy and without it the Industry would have to invent CTR or would be dead."

148. Nonetheless, in its annual reports published between 1985 and 1992, CTR stated that its Scientific Advisory Board funded peer-reviewed research projects "judging them solely on the basis of scientific merit and

relevance." In 1994, Dr. James F. Glenn, CEO of CTR, submitted testimony to the Waxman Subcommittee that:
a. "The Council...sponsors research into questions of tobacco use and health and make the results available to the public."

b. "Council grantees are assured complete scientific freedom in conducting their studies....Publication of research results is encouraged in all instances."

149. The research projects which were sponsored by CTR, were directed away from research that might add to the evidence against smoking. When CTR-sponsored research did produce unfavorable results, the information was distorted or simply suppressed. A researcher named Dr. Freddy Homburger, undertook a study of smoke exposure on hamsters and according to Dr. Homburger, he received a grant from CTR which was changed half-way through the study to contract "so they could control publication--they were quite open about that." According to Dr. Homburger, when the study was completed in 1974, the Scientific Director of CTR and a CTR Lawyer "didn't want us to call anything cancer" and they threatened Dr. Homburger with "never get[ting] a penny more" if his papers were published without deleting the word cancer. An internal CTR document describes how Dr. Homburger attempted to call a press conference about the incident and how CTR stopped it:
"He....was to tell the press that the tobacco industry was attempting to suppress important scientific information about the harmful effects of smoking. He was going to point specifically at CTR."

"I arranged later that evening for it to be canceled."

"Homburger was given a cordial welcome and nicely hastened [sic] out the door."

"P.S. I doubt if you or Tom would want to retain this note."

150. Another mechanism that CTR used to suppress research results that implicated smoking in disease was

selectively to involve lawyers, and then invoke the attorney/client privilege to prevent the disclose of harmful information. CTR used the term "special projects" to mean a project that carried a risk of a negative result that might have to be suppressed. "Special projects" were selected and monitored by industry lawyers to prevent disclosure. One Philip Morris official characterized CTR as a "front" for performing "special projects."

151. Notes prepared at a 1981 meeting of the cigarette industry's Committee of General Counsel state: "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project."

"....we were afraid of discovery for FTC and Aviado, we wanted to protect it under the lawyers. We did not want it out in the open."

152. At least one cigarette company used similar tactics to suppress and avoid disclosure of its internal research on smoking disease. At a time when the company was resisting discovery in a number of personal injury lawsuits, Brown & Williamson's general counsel, J. Kendrick Wells, recommended, in a memorandum dated January 17, 1985, that much of the company's biological research be declared "deadwood" and shipped to England. He recommended that no notes, memos or lists be made about these documents. Wells stated, "I had marked certain of the document references with an X....which I suggested were deadwood in the behavioral and biological studies area. I said that the "B" series are "Janus" series studies and should also be considered as deadwood." ("Janus" was a name of a project that attempted to isolate and remove the harmful elements of tobacco.) Wells further recommended that the research, development and engineering department also should undertake "to remove the deadwood from the files."

153. The sworn statement of Brown & Williamson's former Chief of Research, Jeffrey Wigand, confirms that Brown & Williamson' General Counsel Wells concealed sensitive documents. Wigand stated that Wells sent

sensitive research documents to London to avoid production in litigation, stamped scientific documents "attorney/client work product," even though the document were not specifically created for litigation, and edited and suppressed the minutes of a scientific meeting to remove references to topics which might be the subject of litigation.

154. The CIGARETTE MANUFACTURERS, through CTR, have used lawyers and the claim of attorney/client privilege to insulate CTR-funded research projects from disclosure to the public and to government officials. This conduct demonstrates the falsity of the industry representations jointly to fund objective research, and to report the results of that research to the public."

Suppression and Concealment of Internal Biological Research

155. During the 1960's, RJR established a facility in Winston-Salem, North Carolina, to perform research on the health effects of smoking using mice. Nicknamed the "Mouse House," RJR scientists conducted research in a number of specific areas, including studies of the actual mechanism whereby smoking causes emphysema in the lungs.

156. The RJR lab made significant progress in understanding this mechanism. Despite this progress, RJR disbanded the entire research division in one day, and fired all 26 scientists without notice.

157. Several months before the 1970 closure and firings, RJR attorneys collected dozens of research notebooks from the scientists. The notebooks have still not been voluntarily disclosed. One of the researchers later stated about RJR's executives and lawyers that "they like to take the position that you can't prove harm because you don't know mechanism....And sitting right under their noses is evidence of mechanism[.] What are they going to do with this stuff? They decided to kill it."

158. Internally, an RJR-commissioned report favorably described the Mouse House work as "the more important of the smoking and health research effort because it comes close to determining what was thought to be the underlying pathobiology of emphysema." None of the work done at the "Mouse House" was disclosed to the public.

Safer Cigarette

159. Several cigarette manufacturers' biological research appears to have been directed toward developing a cigarette with reduced health risks. These companies performed research which involved dividing cigarette smoke into its different chemical constituents, or "fractions," to discover which part of the cigarette smoke caused disease. Several companies were successful in discovering which specific constituents in tobacco smoke were carcinogens, or were linked to other diseases. This research was kept secret and never reported to the public.

160. A number of companies also successfully removed certain harmful constituents from cigarette smoke, and developed prototype cigarettes with reduced health effects. These products were never marketed.

161. A memorandum written by an attorney at the firm of Shook, Hardy & Bacon, longtime lawyers for the cigarette industry, articulated the industry-wide position regarding the issue of a safer cigarette. The 1987 memorandum, referring to the marketing by RJR of a smokeless cigarette, Premier, stated that the smokeless cigarette could "have significant effects on the tobacco industry's joint defense efforts" and that "[t]he industry position has always been that there is no alternative design for a cigarette as we know them." The attorney also noted that, "Unfortunately, the Reynolds announcement....seriously undercuts this component of industry's defense."

162. As early as 1958, a memorandum from a Philip Morris researcher to the company's Vice President of Research and Development proposed that the company attempt to make a safer cigarette that could enable it to "jump on the other side of the fence....on the issue of tobacco smoking and health....."

163. Philip Morris did perform the research and development of such a product. However, the company never released the research, and never informed the public that existing cigarettes were not safe or that a safer cigarette was possible. A 1964 Philip Morris research and development presentation to its Board of Directors stated: "Two years ago, in anticipation of a health crisis to be

precipitated by the Smoking and Health Report of the Surgeon General's Committee, we undertook to develop a physiologically superior cigarette.

[W]e put together a charcoal filter product with performance superior to anything in the market place. That product was known as Saratoga. Physiologically it was an outstanding cigarette. Unfortunately then after much discussion we decided not to tell the physiological story which might have appealed to a health conscious segment of the market. The product as test marketed didn't have good 'taste' and consequently was unacceptable to the public ignorant of its physiological superiority."

164. The research and development department at Philip Morris nonetheless viewed continued research into safer cigarettes as necessary to compete in the event that another cigarette company marketed a safer cigarette. The presentation to the Philip Morris Board of Directors continued:
"The Research and Development Department is working to establish a strong technological base with both defensive and offensive capabilities in the smoking and health situation. Our philosophy is not to start a war, but if war comes, we aim to fight well and to win."

165. Liggett also developed a safer cigarette. Company researchers believed that they had discovered which cigarette smoke constituents were carcinogens, and found a way to remove them. Despite Liggett officials' belief that the product was commercially marketable, the company never marketed the safer cigarette and suppressed the research that led to its development.

166. Liggett began its research by repeating the smoke condensate painting studies of mice performed by Dr. Wynder through a contract with a consulting firm. The consulting firm confirmed Dr. Wynder's findings, and, as a result, in 1968, Liggett began "a tobacco additive program designed to reduce or eliminate the tumorigenic activity of cigarette smoke."

167. By 1979, Liggett had declared the work as a success. Company documents state:

"Briefly, as a result of 20 years effort in cooperation with [the consulting firm], we have developed a cigarette system which produces smoke of reduced biological activity....[T]here can be no argument that the use of the additive s has resulted in a product with lower carcinogenic effects."

168. Liggett's safer cigarette, a product called "XA", was never marketed and the XA project was abandoned. On information and belief, Liggett did so for two reasons. First, disclosing the feasibility of a safer cigarette would imply that all existing cigarettes were not safe. Second, Philip Morris apparently threatened Liggett with retaliation if Liggett violated the industry agreement not to disclose negative information on smoking and health. Liggett's Assistant Research Director, Dr. James Mold, reported that Liggett's president said that he was "told by someone in the Philip Morris Company that if we tried to market such a product that they would clobber us."

169. During the XA project, Liggett attempted to insulate the research by the use of company lawyers. According to Dr. Mold, after 9175, "all meetings that we had regarding this project were to be attended by a lawyer.... All paper that was generated....[was] to be directed to the Law Department." Dr. Mold stated that lawyers even collected all the notes after each meeting.

170. Dr. Mold stated that despite its significance, the company lawyers not only ultimately succeeded in stopping the project, but ordered him not to publish the results of the research that led to the safer cigarette. Only an abstract of the paper, modified by the legal department, was published by the consulting firm, without Dr. Mold's name.

171. When asked why Liggett never marketed the safer XA cigarette, Dr. Mold explained that:
"[Management circles] felt that such a cigarette if put on the market would seriously indict them for having sold other types of cigarettes that didn't contain this, for example. Or that they were carrying on this biological research at the same time saying it meant nothing."

172. Liggett had also obtained a patent for the

process it had discovered to produce its safer cigarette. The patent application described the reduction in cancer in mouse studies, prompting stories in the media that Liggett was the first cigarette company to admit that smoking caused cancer. Liggett responding by issuing a press release it called a "Liggettgram" which stated:
"Liggett and the cigarette industry continue to deny, as they have consistently, that any conclusions can be drawn relating such test results on mice in laboratories to cancer in human beings. It has never been established that smoking is a cause of human cancer."

"The laboratory experiments reported in the patent were conducted for Liggett by an independent researcher, The Life Sciences Division of Arthur D. Little, Inc."

173. At the time Liggett made this statement, Dr. Mold estimates that Liggett had spent a total of $10 million on research involving mice, in part to develop the safer XA cigarette. Liggett's internal reports on the benefit of the XA, and the absence of increased risk of harm from the additives used, specifically used animal studies as reliable indicators of the health effect of the product on humans.

174. Despite overwhelming scientific evidence, and the confirmation of this evidence by their own internal research, the cigarette manufacturers and their trade associations continue to this day to repeat over and over, in a unified stance, that there is no causal connection between cigarette smoking and adverse health effects. These representations are misleading, deceptive and untrue. They rest at the heart of the industry's ongoing conspiracy to market and profit from a product it knows is deadly.

II. <u>The role of nicotine in smoking:</u>

175. The tobacco industry has made every effort to conceal and deny that nicotine is a powerful addictive substance. While carefully studying its addictive character and acting upon that knowledge to maintain cigarette sales, each of the CIGARETTE MANUFACTURERS has denied that nicotine is addictive.

176. This public deception and the industry's secret manipulation of nicotine were and are critically important to

the cigarette manufacturers. As objective researchers increased their warnings of the health dangers of cigarettes, nicotine addiction kept people smoking. This second front in their strategy to sell their dangerous products allows the cigarette manufacturers to continue to sell their dangerous products even to those who eventually come to doubt the industry's health claims. And if a new consumer is fooled for a time by "pro-cigarette" disinformation on health, and takes up smoking, it may well be too late. Instead of a simple decision not to purchase a product, the consumer must fight an addiction.

Tobacco Industry Possessed Knowledge of the Addictive Nature of Nicotine

177. Cigarette manufacturers have known since at least the early 1960s of the addictive properties of the nicotine contained in the cigarettes they manufacture and sell. Industry documents are replete with evidence of such knowledge:

a. In 1962, Sir Charles Ellis, scientific advisor to the board of directors of BAT, Brown & Williamson's parent company, stated at a meeting of BAT's worldwide subsidiaries, that "smoking is a habit of addiction" and that "[n]icotine is not only a very fine drug, but the technique of administration by smoking has considerable psychological advantages...." He subsequently described Brown & Williamson as being "in the nicotine rather than the tobacco industry."

b. A research report from 1963 commissioned by Brown & Williamson states that when a chronic smoker is denied nicotine, "[a] body left in this unbalanced state craves for renewed drug intake in order to restore the physiological equilibrium. This unconscious desire explains the addiction of the individual to nicotine." No information from that research has ever been voluntarily disclosed to the public.

c. Addison Yeaman, general counsel at Brown & Williamson, summarized his view about nicotine in an internal memorandum also in 1963: "Moreover, nicotine is addictive. We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms."

d. Internal reports prepared by Philip Morris in 1972 and the Philip Morris U.S.A Research Center in March 1978,

demonstrate Philip Morris' understanding of the role of nicotine in tobacco use: "We think that most smokers can be considered nicotine seekers, for the pharmacological effect of nicotine is one of the rewards that come from smoking. When the smoker quits, he foregoes [sic] his accustomed nicotine. The change is very noticeable, he misses the reward, and so he returns to smoking."

e. From 1940-1970, ATC conducted its own nicotine research, funding over 90 studies on the pharmacological and other effects of nicotine on the body, 80% of all biological studies funded by ATC over this period. In 1969, ATC even test marketed a nicotine-enriched cigarette in Seattle, Washington.

f. In a 1972 document entitled "RJR confidential research planning memorandum on the nature of the tobacco business and the crucial role of nicotine therein," an RJR executive wrote: "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized, and stylized segment of the pharmaceutical industry. Tobacco products uniquely contain and deliver nicotine, a potent drug with a variety of physiological effects."

Suppression and Concealment of Research on Nicotine Addiction

178. The cigarette manufacturers, rather than fulfilling their promise to the public to disclose material information about smoking and health, chose a course of suppression, concealment, and disinformation about the true properties of nicotine and the addictiveness of smoking.

179. Philip Morris hired Victor DeNoble in 1980 to study nicotine's effects on the behavior of rats and to research and test potential nicotine analogues. DeNoble, in turn , recruited Paul C. Mele, a behavioral pharmacologist.

180. DeNoble and Mele discovered that nicotine met two of the hallmarks of potential addiction--self-administration (rats would press levers to inject themselves with a nicotine solution) and tolerance (a given dose of nicotine over time had a reduced effect).

181. However, Philip Morris instructed DeNoble and Mele to keep their work secret, even from fellow Philip Morris scientists. Test animals were delivered at dawn and brought from the loading dock to the laboratory under cover.

182. DeNoble was later told by lawyers for the company that the data he and Mele were generating could be dangerous. Philip Morris executives began talking of killing the research or moving it outside of the company so Philip Morris would have more freedom to disavow the results.

183. In August 1983, Philip Morris ordered DeNoble to withdraw from publication a research paper on nicotine that had already been accepted for publication after a full peer review by the journal Psychopharmacology. According to DeNoble, the company changed its mind because it did not want its own research showing nicotine was addictive or harmful to compromise the company's defense in litigation recently filed against it. He said that Philip Morris officials had rightly interpreted the suppressed nicotine studies as showing that, in terms of addictiveness, "nicotine looked like heroin."

184. In April 1984, Philip Morris closed DeNoble's nicotine research lab. DeNoble and Mele were forced abruptly to halt their studies, turn off all their instruments and turn in their security badges by morning. Philip Morris executives threatened them with legal action if they published or talked about their nicotine research. According to DeNoble, the lab literally vanished overnight. The animals were killed, the equipment was removed and all traces of the former lab were eliminated.

185. DeNoble testified to the Waxman Subcommittee that "senior research management in Richmond, Va. , as well as top official at the Philip Morris Company in New York, continually reviewed our research and approved our research." DeNoble also stated that these officials were specifically told that nicotine was a drug of abuse.

186. Brown & Williamson undertook its potentially sensitive research on nicotine through a contractor in Geneva, Switzerland, and through British affiliates at an English lab called Harrogate.

187. In 1963, Brown & Williamson debated internally whether to disclose to the U.S. Surgeon General, who was preparing his first official report on smoking and health, what the company knew about the addictiveness of nicotine and the adverse effects of smoking on health. Addison Yeaman, general counsel, advised Brown &

Williamson to "accept its responsibility" and disclose its finding to the Surgeon General He said that such disclosure would then allow the company openly to research and develop a safer cigarette.

188. Brown & Williamson rejected Yeaman's advice to make full disclosure to the Surgeon General. A series of six letter and telexes exchanged by Yeaman and senior BAT official A.D. McCormick between June 28 and August 8, 1963, document the company's decision not to disclose its research findings to the Surgeon General. That research, some of which was later characterized in a report in the Journal of the American Medical Association as "at the cutting edge of nicotine pharmacology," preceded the main published reports from the general scientific community by several years.

Tobacco Industry's Interest, Control and Manipulation of Nicotine's Content (Y-1) and Delivery

189. A chronology of the industry's research and development activities confirms that the cigarette manufacturers understood early on that nicotine was the key to their industry's success. The industry has conducted extensive research research establishing that smokers require a certain level of nicotine from their cigarettes and that tobacco "satisfaction" is attributable to nicotine's effect on the body after absorption.

190. Philip Morris internal reports from 1972 and 1978 characterize the role of nicotine in tobacco use: "The cigarette should be conceived not as the product but as a package. The product is nicotine....Think of the cigarette pack as a storage container for a day's supply of nicotine....Think of the cigarette as a dispenser for a dose unit of nicotine."

191. Documents from a BAT study called Project Hippo, uncovered only in May 1994, show that as far back as 1961, this cigarette company was actively studying the physiological and pharmacological effects of nicotine. Project hippo reports were circulated to other U.S. cigarette manufacturers and to TIRC, demonstrating that at least some of the industry's nicotine research was shared. BAT sent the reports to officials at Brown & Williamson and RJR,

and circulated a copy to TIRC with a request that TIRC "consider whether it would help the U.S. industry for these reports to be passed on to the Surgeon General's Committee."

192. Similarly, an RJR-MacDonald Marketing Summary Report from 1983 concluded that the primary reason people smoke "is probably the physiological satisfaction provided by the nicotine level of the product."

193. To this day, the cigarette manufacturers have concealed from the public and public health officials their extensive knowledge of the addictive properties of nicotine and its critical role in smoking.

194. As recently as December 1995, the Wall Street Journal reported on an internal Philip Morris draft document analyzing the competitive market for nicotine products for the years 1990-1992. The report describes the importance of nicotine:

"Different people smoke for different reasons. But the primary reason is to deliver nicotine into their bodies....It is a physiologically active, nitrogen containing substance. Similar organic chemicals include nicotine, quinine, cocaine, atropine and morphine. While each of these substances can be used to affect human physiology, nicotine has a particularly broad range of influence. During the smoking act, nicotine is inhaled into the lungs in smoke, enters the bloodstream and travels to the brain in about eight to ten seconds."

195. The cigarette manufacturers have long understood that reducing or eliminating nicotine from their products would hurt sales. As one company researcher wrote in a 1978 report to Philip Morris executives:

"If the industry's introduction of acceptable low-nicotine products does make it easier for dedicated smokers to quit, then the wisdom of the introduction is open to debate."

196. Instead, the industry attempted to develop ostensibly safer ways of delivering adequate doses of nicotine to create and sustain addiction in the smoker.

197. Some members of the industry studied artificial nicotine or nicotine analogues that would have the addictive and psychopharmacological properties of nicotine without

its dangerous effects on the heart. Dr. DeNoble was hired by Philip Morris, in part, to research and develop a nicotine analogue.

198. DeNoble did discover such an analogue, but Philip Morris chose to halt its effort to determine whether the nicotine analogue could be used to make a safer cigarette. On information and belief, Philip Morris decided not to pursue nicotine analogues in order to avoid the risk of adverse publicity and of compromising the industry's consistent position that there was no alternative design for cigarettes.

199. Brown & Williamson also understood that nicotine was the essential ingredient in maintaining tobacco sales. The company attempted to develop a "safer" cigarette which internal documents described as "a nicotine delivery device."

200. By the end of the 1970's, however, Brown & Williamson, in a pattern that was repeated throughout the industry, closed its research labs and halted all work on a safer cigarette.

201. RJR's efforts to develop a safer cigarette also focused on delivering nicotine to the consumer without the harmful constituents of tobacco smoke. In the late 1980's, RJR developed and test marketed Premier, a smokeless and virtually tobacco-free cigarette which was, in essence, a nicotine delivery system.

202. The cigarette manufacturers have affirmatively misrepresented to consumers and to Congress the role of nicotine in tobacco use. Even today, Brown & Williamson, RJR and TI continue to claim that nicotine is important in cigarettes for taste and "mouth-feel." However, tobacco industry patents specifically distinguish nicotine from flavorants and an RJR book on flavoring tobacco, while listing approximately a thousand flavorants, fails to include nicotine as a flavoring agent. The cigarette industry has actually concentrated on developing technologies to mask the acrid flavor of increased levels of nicotine in cigarettes.

203. Cigarette manufacturers have developed and used highly sophisticated technologies designed to deliver nicotine in precisely calculated quantities ---quantities that are more than sufficient to create and sustain addiction in the vast majority of individuals who smoke regularly.

Cigarette manufacturers control the nicotine content of their products through selective breeding and cultivation of plants for nicotine content, and careful tobacco leaf purchasing plans. The companies control nicotine delivery (i.e., the amount received by the smoker) with various design and manufacturing techniques.

204. The story of Brown & Williamson's development of a new tobacco plant dubbed "Y-1" is one of the more egregious examples of the cigarette industry's concealment of its control and manipulation of the nicotine levels in its products.

205. On June 21, 1994, Dr. David A. Kessler, Commissioner of the Food & Drug Administration, told the Waxman Subcommittee that FDA investigators had discovered that Brown & Williamson had developed a high nicotine tobacco plant, which the company called "Y-1". This discovery followed Brown & Williamson's flat denial to the FDA on May 3, 1994, that it had engaged in "any breeding of tobacco for high or low nicotine levels."

206. When four FDA investigators visited the Brown Williamson plant in Macon, Georgia on May 3, 1994, Brown & Williamson officials denied that the company was involved in breeding tobacco for specific nicotine levels. Only after the FDA had learned o the development of Y-1 in its investigation and confronted company officials with the evidence did the company admit that it was growing and using the high-nicotine plant.

207. In fact, in a decade-long project, Brown & Williamson secretly developed a genetically-engineered tobacco plant with a nicotine content more than twice the average found naturally in flue-cured tobacco. Brown & Williamson took out a Brazilian patent for the new plant, which was printed in Portuguese, Brown & Williamson and a Brazilian sister company, Souza Cruz Overseas, grew Y-1 in Brazil and shipped it to the United States where it was used by Brown & Williamson in various brands, marketed in the United States and the State of California, some of which were labeled "light". When the company's deception was uncovered, company officials admitted that close to four million pounds of Y-1 were stored in company warehouses in the United States.

208. As part of its cover-up, Brown & Williamson

even went so far as to instruct the corporation which had developed Y-1, to mislead FDA investigators that Y-1 had "never [been] commercialized." Only after the FDA discovered two United States Customs Service invoices indicating that "more than a half-million pounds" of Y-1 tobacco had been shipped to Brown & Williamson on September 21, 1992, did the company admit that it had developed the high-nicotine tobacco.

209. Y-1 is one example of an overall trend in the tobacco industry to increase the nicotine content of tobaccos. American tobaccos of all types have undergone cumulative increases in total nicotine levels sine the 1950s. Nicotine levels in the most widely grown American tobaccos increased between 10-50 percent between 1955 and 1980. On information and belief, this increase is the result of the industry's active and controlling participation in efforts to breed and cultivate tobacco for high nicotine levels.

210. The nicotine content of the raw tobacco is not the only variable manipulated by the cigarette manufacturers to deliver pharmacologically active dose of nicotine to the smoker. Cigarettes are designed and manufactured by said defendants who control nicotine delivery to the smoker. Cigarette manufacturers add several ammonia compounds during the manufacturing process which increase the delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes.

211. In 1995, Brown & Williamson publicly denied that the use of ammonia in the processing of tobacco increases the amount of nicotine absorbed by the smoker. Nevertheless, the company's own internal documents reveal that it and the other cigarette manufacturers use ammonia compounds to increase nicotine delivery. A 1991 Brown & Williamson confidential blending manual states:

"Ammonia, when added to a tobacco blend, reacts with the indigenous nicotine salts and liberates free nicotine....As the result of such change the ratio of extractable nicotine to bound nicotine in the smoke may be altered in favor of extractable nicotine. As we know, extractable nicotine contributes to impact in cigarette smoke and this is how ammonia can act as an impact booster."

According to the Brown & Williamson manual, all American

cigarette manufacturers except Liggett use ammonia technology in their cigarettes.

212. Tobacco industry patents also show that the cigarette industry has developed the capability to manipulate nicotine levels in cigarettes to an exacting degree. For example:

a. A Philip Morris patent application discusses an invention that "permits the release.....in controlled amounts and when desired, of nicotine into tobacco smoke."

b. Another Philip Morris patent application explains that the proposed invention "is particularly useful for the maintenance of the proper amount of nicotine in tobacco smoke," and notes that "previous efforts have been made to add nicotine to tobacco products when the nicotine level in the tobacco was undesirably low."

c. A 1991 RJR patent application states that "processed tobaccos can be manufactured under conditions suitable to provide products having various nicotine levels."

213. Dr. David A. Kessler testified in detail before the Waxman Subcommittee about the various forms of nicotine manipulation practiced by the tobacco industry: manipulating the rate at which nicotine is delivered in the cigarette; transferring nicotine from one material to another ; increasing the amount of nicotine in cigarettes; and adding nicotine to any part of a cigarette.

214. Dr. Kessler's disclosures show that nicotine is not an inevitable or unavoidable component of tobacco products. In fact, each of the defendant cigarette manufacturers has the capability to remove all or virtually all of the nicotine from cigarettes using technology already in existence.

215. The cigarette manufacturers' manipulation and control of nicotine levels is further evidenced by the emergence of companies that specialize in manipulating nicotine and that are now offering their services to tobacco manufacturers. On information and belief, a process called tobacco reconstitution, patented and marketed by the Kimberly-Clark Corporation subsidiary, LTR Industries, is widely used throughout the industry.

216. Reconstituted tobacco is made from stalks and stems and other waste that cigarette manufacturers formerly discarded and now use to make cigarettes more cheaply. In the reconstitution process, pieces of tobacco material undergo treatment that results in the extraction of some soluble components, including nicotine. The pieces are then physically formed into a sheet of tobacco material, to which the extracted nicotine is re-added. Although denied by tobacco executive, it is publicly reported that this process adjusts nicotine levels in the products, and that one manufacturer "readily admits to setting levels of nicotine....for the tobacco sheet."

217. An advertisement in tobacco industry trade publications for the Kimberly-Clark tobacco reconstitution process states:

"Nicotine levels are becoming a growing concern to the designers of modern cigarettes, particularly those with lower 'tar' deliveries. The Kimberly-Clark tobacco reconstitution process used by LTR Industries permits adjustment of nicotine to your exact requirements...We can help you control your tobacco."

218. The tobacco industry's own trade literature explain that the Kimberly-Clark process enable manufacturers to triple or even quadruple the nicotine content of reconstituted tobacco, thereby increasing the nicotine content of the final manufactured product.

219. Another enterprise quite explicitly specializes in the manipulation of nicotine and its use as an additive. This company does business under the name "The Tobacco Companies of the Contraf Group." An advertisement run by the Contraf Group in the international trade press states: "Don't Do Everything Yourself! Let us do it More Efficiently!" Calling itself "The Niche Market Specialist," Contraf lists among its areas of specialization "Pure Nicotine and other special additives."

220. The cigarette industry's manipulation of nicotine is particularly deceptive in its marketing of "light" or low-tar and low-nicotine cigarettes to retain the health conscious segment of the smoking market. Recent studies demonstrate that cigarettes advertised as low tar and low nicotine have high concentration of nicotine, by weight, than

high yield cigarettes. Nevertheless, the cigarette manufacturers have successfully identified "light" cigarette to consumer as a reduced tar and reduced nicotine product. The cigarette manufacturers have accomplished this deception through several strategies.

221. First, cigarette manufacturers have designed their "light" products so that advertised tar and nicotine levels understate the amounts of tar and nicotine actually ingested by human smokers. Such design features include a technique called filter ventilation in which nearly invisible holes are drilled in the filter paper, or the filter paper is made more porous. Predictably, many smokers of advertised low tar and nicotine cigarettes block the tiny, laser generated perforations in ventilated filters with their fingers or lips, thereby resulting in greater tar and nicotine yields to those smokers than those measured by the FTC smoking machine.

222. Cigarette manufacturers know that the ability to block ventilation holes allows smokers to "compensate" for nicotine losses that would otherwise be caused by tar-reducing modifications. The industry has studied smoker compensation in order to design cigarettes that allow smokers to compensate for lower nicotine yields. One such design feature is known as "elasticity." This refers to the ability of a cigarette, whatever its FTC measured nicotine yield, to deliver enough smoke to permit a smoker to obtain the nicotine he needs, e.g., through more or longer puffs, or by covering ventilation holes.

223. Industry studies show that smokers tend to obtain close to the same amount of nicotine from each cigarette despite differences in yield as measured by the FTC smoking machine. In a 1974 BAT conference, researchers described the result of one such study:

"The Kippa study in Germany suggests that whatever the characteristics of cigarettes as determined by smoking machines, the smoker adjusts his pattern to deliver his own nicotine requirements (about 0.8mg. per cigarette)."

Smokers' compensation to obtain adequate nicotine also results in the delivery of more tar than the FTC test measure.

224. Second, the use of the more potent "free" nicotine that ammonia helps release, as opposed to the

slower acting salt-bound nicotine, also serves to increase the amount of nicotine delivered to smokers of "light" cigarettes. An ammoniated cigarette that delivers more potent nicotine to smokers measures the same as a cigarette with no such additives.

225. The use of ammonia is another method used by the cigarette industry to reduce the FTC measured tar and nicotine levels in their cigarettes over the past two decades while still furnishing smokers with sufficient nicotine delivery. According to John Kreisher, a former associate scientific director for CTR, "[a]mmonia helped the industry lower the tar and allowed smokers to get more bang with less nicotine. It solved a couple of problems a the same time.

226. Third, the cigarette industry maintains that nicotine levels follow tar levels. In the words of Dr. Alexander Spears, Vice Chairman of Lorillard, in his 1994 testimony before the Waxman Subcommittee--"[n]icotine [level] follows the tar level," and the correlation between the two "is essentially perfect," and "shows that there is no manipulation of nicotine." Dr. Spears neglected to mention to congress that in a 1981 study, not intended for public release, he stated explicitly that low-tar cigarettes use special blends of tobacco to keep the level of nicotine up while tar is reduced: "[T]he lowest tar segment [of product categories] is composed of cigarettes utilized a tobacco blend which is significantly higher in nicotine." RJR, Lorillard, ATC and TI have similarly represented to the public and to the FDA that the nicotine levels in their products are purely a function of setting the tar levels of such products.

227. ATC told the Waxman Subcommittee in an October 14, 1994 letter that "nicotine follows 'tar' delivery--high nicotine, low 'tar'--low nicotine..... Nicotine is neither adjusted nor altered to compensate for losses inherent in the manufacturing process." Internal company documents reviewed by the Waxman Subcommittee show, however, that ATC's experimentation with adding nicotine to its tobacco was extensive--extensive enough for ATC executive John T. Ashworth to instruct employees in a confidential memorandum: "In the future, our use of nicotine should be referred to as 'Compound W' in our experimental work,

reports, and memorandums, either for distribution within the Department or for outside distribution."

228. Recent tests conducted at the direction of the FDA show that the low-tar brands actually have more nicotine by weight than the non-"light" brands. The high level of nicotine found in lower tar cigarettes seriously misleads consumers and render the industry's claim of an "essentially perfect" correlation between reduced tar and nicotine levels false. According to the FDA, this has been accomplished by a combination of the methods described above for boosting nicotine delivery to compensate for nicotine losses from the application of tar-reducing design modifications. The cigarette industry thereby maintains a continuing market for a product that consumers are misled to believe contains less of each of the harmful ingredients in regular cigarettes.

229. Against this mounting body of evidence of the cigarette industry's manipulation and control of nicotine levels in cigarettes, the cigarette manufacturers continue to deny to the public, and recently denied to Congress under oath, that they manipulate and control nicotine levels. Top executives from Philip Morris, RJR, Lorillard, Liggett and Brown & Williamson testified in April 1994 that their respective companies do not manipulate nicotine, add it, independently control it, restore it during the manufacturing process, or otherwise achieve a minimum level of nicotine in their products. Thomas E. Sandefur, Jr., CEO of Brown & Williamson, has admitted that the company controlled nicotine, but in a now familiar refrain, stated that the company did so only for "taste."

230. Thus, the cigarette manufacturers' attempt to deceive the public and government officials continues. As recently as April 1994, cigarette manufacturers placed advertisements across the country denying that they believe cigarette smoking is addictive, and misleading the public about whether the cigarette manufacturers deliberately control nicotine levels in their products.

231. An advertisement placed by Philip Morris in newspapers across the country in April 1994 affirmatively represented that Philip Morris does not "manipulate" nicotine levels in its cigarettes, and that "Philip Morris does not believe that cigarette smoking is addictive."

232. RJR placed a similar advertisement in newspapers across the United States in 1994 stating that "we do not increase the level of nicotine in any of our products in order to "addict" smokers. Instead of increasing the nicotine levels in our products, we have in fact worked hard to decrease 'tar' and nicotine....RJR's advertisement then touted its use of "various techniques that help us reduce the 'tar' (and consequently the nicotine) yields of our products."

233. These statements mislead the consuming public because, as alleged above, Philip Morris and RJR use various sophisticated techniques to increase the nicotine content in their cigarettes and the actual nicotine delivery to the smokers.

III. The Sales to Minors

234. In California, across the nation and across the world, the overwhelming majority of cigarette use and addiction begins when users are children or teenagers. A person who does not begin smoking in childhood or adolescence is unlikely ever to begin. The younger a person begins to smoke, the more likely he or she is to become a heavy smoker.

235. Smoking at an early age increases the risk of lung cancer, impairment to lung function and other diseases and studies have shown that lung cancer mortality is highest among adults who began smoking before the age of 15. Although young people frequently believe they will not become long-term users of tobacco products, they often find themselves unable to quit smoking because of the addictive nature of nicotine.

236. Cigarettes are among the most promoted consumer product in the United States. The Federal Trade Commission reported to Congress that domestic cigarette advertising and promotional expenditures rose from close to $4 billion in 1990 to more than $6 billion in 1993. Tobacco product brand names, logos and advertising messages are all-pervasive, appearing on billboards, buses, trains, in magazines and newspapers, on clothing and other goods. The effect is to convey the message to young people that tobacco use is desirable, socially acceptable, safe, healthy, and prevalent in society. Additionally, young people buy

the most heavily advertised cigarette brands, whereas many adults buy more generic or value-based cigarette brands which have little or no image-based advertising. Cigarette Manufacturers, knowing that their advertising appeals to young people, continue to use these same marketing techniques to sell their products.

237. A 1995 report by the California Department of Health Services surveyed tobacco advertisements in or around stores, it found that Marlboro was the most frequently advertised and promoted cigarette brand and Camel was the second most frequently advertised and promoted cigarette brand. Not surprisingly, Marlboro and Camel are the leading brands smoked by children.

238. RJR have even identified the stores in proximity to the youth market. RJR's Division Manager for Sales wrote all RJR sales representatives in 1990 regarding the "Young Adult Market" and asked them to identify what stores were in proximity to colleges or high schools. A follow-up letter by the states division calls for a resubmitted list of Y.A.S. (Young Adult Smoker) accounts using new criteria, focusing on all accounts located across from, adjacent to, or in the general vicinity of high schools or college campuses. Eighty-two (82%) percent of daily smokers in the United States had their first cigarette before the age of eighteen.

239. Despite these disturbing statistics, each of the cigarette manufacturers maintains that the effect of its pervasive advertising and promotion of cigarettes is limited to maintaining brand loyalty and that it has no role in encouraging adolescents to experiment with smoking.

240. The cigarette manufacturers know that they attract underage consumers to their products. Since 1988, RJR has used a cartoon character called Joe Camel in its advertising campaign. It has massively disseminated products such as matchbooks, signs, clothing, mugs, and drink can holders adverting Camel cigarettes. The advertising has been effective in attracting adolescents. As a result of the campaign, the number of teenage smokers who smoke Camel cigarettes has risen dramatically. One study found that Joe Camel is almost as familiar to six-year old children as Mickey Mouse, is enticing thousand of teens to smoke that brand, and has caused Camel's popularity with 12-17 year olds to surge dramatically. RJR knew or willfully

disregarded the fact that cartoon characters attract children.

241. The model who portrayed the "Winston Man" for RJR's Winston brand cigarettes testified before Congress: "I was clearly told that young people were the market that we were going after." He further testified that "it was clear to us that this image was important because kids like to role play, and we were to provide the attractive role models for them to follow....I was told I was a live version of the GIJoe....."

242. An RJR affiliate studied in detail the motivations of young smokers. A "Youth Target" study was the first of a planned series of research studies into the lifestyles and value systems of young men and women in the 15-24 age range, the stated purpose of which was to "provide marketers and policy makers with an enriched understanding of the mores and motives of this important emerging adult segment which can be applied to better decision making in regard to products and programs directed at youth." The study focused on the "primary elements of lifestyles and values among the youth of today," in learning how to market products to children and teens.

243. Plaintiff began smoking as a minor, prior to 1969, having been influenced and induced to smoke, relying to his detriment upon the continuing aggressive campaign of advertisements, inducements, informational communications, and promotional items to hook youth smokers.

244. Plaintiff was not aware that smoking increased his risk of developing, and did cause him to develop, smoking-related illness, when he was induced by the pre-1969 advertising and representations by the CIGARETTE MANUFACTURERS and their TRADE ASSOCIATIONS, to smoke cigarettes as a minor, before any caution or warning labels were placed on cigarette packages.

245. Plaintiff was not aware that smoking increased his risk of developing, and did cause him to develop, smoking-related illness, when he was induced by the post-1969 informational communications by the tobacco industry to continue to smoke cigarettes.

246. Plaintiff was diagnosed with smoking-related illness on or about January26th, 2000.

247. Had plaintiff known the true facts concerning

the magnitude of the health risks of smoking, the addictive nature of nicotine, the intentional manipulation of nicotine levels in cigarettes, or the targeting of him and other youths like him to replace in the market those older cigarette smokers who were dying from smoking, he would never would have started smoking.

248. As a direct and proximate result of Defendants' fraud and concealment and suppression of material facts, Plaintiff suffered and continues to suffer addiction to the chemical substance nicotine contained in tobacco product, impairment to lung function known as "dyspnea", inability to breath except in an upright position known as "orthopnea", damage to his lungs, premature aging to his lungs, difficulty breathing, chest pain, physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep, all to his damages in an amount which is not fully ascertained but within the jurisdiction of this Court, according to proof at trial.

249. The conduct of Defendants as described herein was willful, oppressive and malicious, thereby entitling Plaintiff to an award of punitive damages in an amount appropriate to punish and make an example of them for their reckless, wanton and willful disregard to Plaintiff's safety as well as the public at large in the manufacture, design and manipulation of nicotine, a toxic and hazardous substance.

WHEREFORE, Plaintiff seeks relief as set forth below.

**FOR A SIXTH CAUSE OF ACTION**
**AGAINST ALL DEFENDANTS**

**INTENTIONAL MISREPRESENTATION**

As a sixth, separate and distinct cause of action, Plaintiff, MAHER W. SOLIMAN, complains against said Defendants and each of them, and for a cause of action alleges as follows:

250. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 249, inclusive as though fully set forth herein.

251. Plaintiff and the reasonable consumer was misled by the representations, advertisements,

announcements and testimonies which were made by Defendants. Plaintiff was led to believe that cigarettes are not addictive and that he was not exposed to any risks of harm resulting from his consumption of cigarettes. In fact, the representations, advertisements, announcements and testimonies of Defendants were false and that on or about October 15th, 1999, Plaintiff discovered that he was addicted to cigarettes and has been subjected to serious health problems, risks and injury as a result to consuming cigarettes, the products of Defendants.

252. The Defendants herein and each of them, was under a duty to Plaintiff and to provide Plaintiff with honest representation and to disclose to him the addictive nature of nicotine, their manipulation of nicotine levels in tobacco products and their intent to addict him as well as the consuming public at large. Defendants had a duty to provide Plaintiff an access to all the material facts, including but not limited to, the addictive nature of nicotine; the manipulation of nicotine levels in its cigarette products; and its intent to addict Plaintiff as well as the consuming public at large. Defendants knew that prior to Plaintiff's addiction to nicotine, Plaintiff could not reasonably have discovered the addictive nature of nicotine; the manipulation of nicotine levels; and Defendants' intent to addict him. Defendants engaged in a conduct which amounted to actively concealing the addictive nature of nicotine; its manipulation of nicotine levels in cigarettes; and its intent to addict Plaintiff.

253. Defendants have repeatedly engaged in a conduct which amounted to intentional misrepresentation to distort the true facts about smoking, related addiction and illnesses. Defendants have intentionally miscalculated and inaccurately measured the level of tar and nicotine in cigarettes so as to understate the level of ingredients to deceive Plaintiff, the consuming public at large and the government agencies who are responsible of policing their product. Defendants intentionally manipulated the level of nicotine so that far more nicotine is inhaled and received in the lungs in order to addict Plaintiff and the consuming public at large. Furthermore, Defendants have intentionally misrepresented the amount of tar and nicotine on their cigarette packages with full knowledge that the amount of

nicotine and tar is far greater than disclosed.

254. Defendant COUNCIL FOR TOBACCO RESEARCH-U.S.A. and Defendant TOBACCO INSTITUTE, intentionally represented themselves as unbiased and objective entities that gathered data regarding the tobacco products and cigarettes, while in fact, both Defendants, COUNCIL FOR TOBACCO RESEARCH-U.S.A. and TOBACCO INSTITUTE, INC. have concealed their data and distorted the truth regarding the addictive nature of tobacco and the danger to health from smoking.

255. Defendant COUNCIL FOR TOBACCO RESEARCH-U.S.A. have intentionally and repeatedly misrepresented their research data with regard to the amount of risks and danger associated with smoking cigarettes and the addictive nature of the chemical substance of nicotine.

256. Defendant COUNCIL FOR TOBACCO RESEARCH-U.S.A. have engaged in a conduct that amounted to suppressing medical testing and research establishing the addictive nature of the chemical substance of nicotine and its link and consequences to health.

257. Defendants and each of them at all relevant times mentioned herein knew that the chemical substance of nicotine was addictive, yet they manipulated the level of nicotine in cigarettes so as to addict Plaintiff and the consuming public at large.

258. Defendants and each of them made representations that were false with the intent to induce Plaintiff and the public at large to purchase their defective products and at the time these representations were made, Plaintiff was ignorant of the falsity of Defendants' representations and believed them to be true. In reliance on these representations, Plaintiff was induced to and did act as a consumer to Defendants' tobacco products and cigarettes and became addicted.

259. Defendants and each of them misrepresented to plaintiff and to the public at large, through continuing advertising campaigns in the print, radio, cinema and television media until 1969, and after 1969 in informational communications, sponsorship of sports activities, concerts, and other events including but not limited to, testimonies

and public statements by officers, agents and employees of the Tobacco Industry that the cigarettes manufactured, sold, and distributed by defendants were safe for consumption in their ordinary and foreseeable use. Plaintiff was induced to unknowingly expose himself to the hazards of cigarettes and he was induced to begin smoking because these defendants targeted, and continue to target youth and minors to hook them early on their cigarettes to replace older, dying smokers. The representative sample of defendants' promotions prior to 1969 in countless advertisements and after 1969 in deceptive and fraudulent informational communications and authorized public statements were:

a. Beginning in 1952 and continuing for many years up to 1969,defendant Liggett & Meyers promised in their Chesterfield pre-1969 advertisements and post-1969 statements:

.....[P]roved by over 40 years of continuous use....as entirely safe for use in the mouth - chemically pure, far more costly glycerol and pure sugars which are natural to tobacco - nothing else. [bold emphasis added]

A medical specialist is making regular bi-monthly examinations of a group of people from various walks of life. 45 percent of this group have smoked Chesterfield for an average of over ten years.

After eight months, the medical specialist reports that he observed no adverse effects on the nose, throat and sinuses of the group from smoking Chesterfield.

b. Beginning in 1951 and continuing for many years up to 1969, defendant RJR advertised, and after 1969 stated that its Camel cigarettes were "tested" by "noted throat specialists":

Not one single case of throat irritation due to smoking camels!

More doctors smoke Camels than any other cigarette

c. In 1962, the Tobacco Institute issued a press release promising:

We in the tobacco industry recognize a special responsibility to help science determine facts.

d. In a 1972 Wall Street Journal article, James Bowling, a Vice President of co-conspirator Philip Morris, Inc., was quoted as saying:
If our product is harmful...we'll stop making it. We now know enough that we can take anything out of our product, but we don't know what ingredients to take out....

e. In 1978, a Tobacco Institute informational pamphlet stated:
The flat assertion that smoking causes lung cancer and heart disease and that the case is proved is not supported by many of the world's leading scientists.

f. In 1983, RJR represented:

It has been stated so often that smoking causes cancer, it's no wonder most people believe this is an established fact. But, in fact, it is nothing of the kind. The truth is that almost three decades of research have failed to produce scientific proof for this claim....in our opinion, the issue of smoking and lung cancer is not a closed case. It's an open controversy.

260. In January 1954, when the Tobacco Industry announced they were establishing a joint industry group known as the Tobacco Industry Research Committee (TIRC), they pledged, through TIRC, aid and assistance to the research efforts into all phases of tobacco use and health, expressly undertaking an interest in health as their basic responsibility paramount to every other consideration. At the same time, Tobacco Industry represented that there was no proof that cigarette smoking is one of the causes of lung cancer and/or diseases. When they made these representations, Tobacco Industry intended that the public, including plaintiff, would both believe in and rely upon this public announcement, and they knew or should have known that these pronouncements would permeate the public conscience and allow present and future smokers to believe that, despite what they have heard elsewhere, the hazards of cigarette smoking had not been proven. Tobacco Industry further made many representations including, but not limited to, the following:

a. In 1962, the Tobacco Institute, Inc., an agent of the cigarette defendants, ("Tobacco institute") issued a press release which stated, in pertinent part:

We in the tobacco industry recognize a special responsibility to help science determine the facts. And we believe we are fulfilling this responsibility through the Tobacco Industry Research Committee.

b. In 1971, the Tobacco Institute in a press release stated:

Any organization in a position to apply resources in the search for those keys - and which fails to do so - will continue to be guilty of cruel neglect of those whom it pretends to serve.

c. In 1982, the Tobacco Institute published a pamphlet in which it wrote:

Since the first questions were raised about smoking as a possible health factor, the tobacco industry has believed that the American people deserve objective, scientific answers. The industry has committed itself to this task.

d. In 1990, a public relations employee of Defendant RJ Reynolds Tobacco Company ("RJR") wrote a letter to a person by the name of Rock in Minnesota, apparently in response to a letter from Rock. The public relations employee asserted in that letter that "....scientists do not know the cause or causes of the chronic diseases reported to be associated with smoking." the letter went on:

Our company intends, therefore, to continue to support [research] in a continuing search for answers.

261. Plaintiff relied, to his detriment, upon the representations of the defendants and each of them in many of the literally thousands of pre-1969 advertisements and promotional activities.

262. Plaintiff also relied, to his detriment, upon the representations of the defendants and each of them in the post-1969 dissemination of free cigarettes and informational

communications aimed at plaintiff, public at large and the United States Government.

263. Said representations by defendants and each of them, were false and untrue, in that cigarettes and other tobacco products were not safe for consumption whereby said products cause lung cancer, impairment to lung function and other lung disabilities, heart disease and other smoking-related diseases.

264. On or about January 26th, 2000, Plaintiff was diagnosed with smoking-related disease.

265. Plaintiff had relied on each of the Defendants' misrepresentations and omissions and his reliance was justified in which Plaintiff has become addicted to cigarettes and has been damaged as a result to his addiction and sustained serious illness.

266. Defendants, and each of them, knew that nicotine was addictive and that their products were unreasonably dangerous when used as directed and would cause serious health problems and complications. Notwithstanding those facts, Defendants have manipulated the levels of nicotine in cigarettes with the intent to cause Plaintiff addiction. Defendants and each of them, have intentionally withheld the true facts from disclosing to the Plaintiff for the purpose of inducing him to purchase cigarettes, to become addicted, which caused him serious illness, pain and suffering.

267. As a direct and proximate result of Defendants' intentional misrepresentation of material facts, Plaintiff suffered and continues to suffer addiction to the chemical substance nicotine contained in tobacco product, impairment to lung function known as "dyspnea", inability to breath except in an upright position known as "orthopnea", damage to his lungs, premature aging to his lungs, difficulty breathing, chest pain, physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep, all to his damages in an amount which is not fully ascertained but within the jurisdiction of this Court, according to proof at trial.

268. The conduct of Defendants as described herein was willful, oppressive and malicious, thereby entitling Plaintiff to an award of punitive damages in an amount appropriate to punish and make an example of them for

their reckless, wanton and willful disregard to Plaintiff's safety as well as the public at large in the manufacture, design and manipulation of nicotine, a toxic and hazardous substance.

WHEREFORE, Plaintiff seeks relief as set forth below.

**FOR A SEVENTH CAUSE OF ACTION AGAINST ALL DEFENDANTS**

**CONSPIRACY TO COMMIT FRAUD AND MISREPRESENTATION**

As a seventh, separate and distinct cause of action, Plaintiff, MAHER W. SOLIMAN, complains against said Defendants and each of them, and for a cause of action alleges as follows:

269. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 268, inclusive as though fully set forth herein.

270. Defendants and each of them conspired to deprive Plaintiff and the public at large of their medical testing and scientific data which provides the danger to health associated with smoking tobacco products and cigarettes and they further conspired to deprive Plaintiff and the public at large from all information with regard to the addictive toxic chemical substance of nicotine.

271. Defendants and each of them have worked together to mislead Plaintiff and the public at large by managing an advertising campaign to target children and teenagers to attract them to smoking. Their conspiracy omitted all information with regard to the addictive nature of nicotine; the manipulation of nicotine level in its cigarette products; and their intent to addict Plaintiff and the public at large.

272. Defendants and each of them have conspired together to refute and undermine all information coming from the scientific and medical community with the intent to mislead Plaintiff and the consuming public at large to believe that he has made an "adult choice" to continue smoking.

273. Defendants and each of them conspired together to suppress all medical testings and scientific data that the chemical substance of nicotine is addictive and is

directly linked to lung cancer, emphysema, heart disease and other serious illnesses.

274. Defendants and each of them conspired together to manipulate the levels of nicotine in cigarettes with the intent that Plaintiff and the consuming public at large remain addicted to their defective product.

275. Defendants and each of them conspired together to misrepresent the true measurement of tar and nicotine in cigarettes with full knowledge that the nicotine and tar in cigarettes is far greater than they disclosed.

276. Defendants and each of them conspired to misrepresent to Plaintiff and the public at large, that smoking cigarettes does not cause nor is it responsible for any diseases while their medical testing and scientific data provided opposite results to their claim.

277. Defendants and each of them conspired together to misrepresent to Plaintiff and the public at large as well as members of the United States Congress, under oath, that nicotine is not addictive and smoking cigarettes does not cause disease nor is it responsible for any death.

278. Defendants and each of them conspired together to avoid producing new non-addictive product, nicotine free, in place and instead of addictive cigarettes that contain the toxic chemical substance of nicotine.

279. Defendants and each of them conspired together to misrepresent and falsify their scientific data through their campaign of deception in order to keep Plaintiff and the public at large addicted to their defective product of cigarettes to maximize their profits by concealing that the chemical substance of nicotine is addictive; the manipulation of nicotine levels; and their intent in addicting Plaintiff and the consuming public at large.

280. Plaintiff relied on Defendants' fraud and misrepresentations who have conspired against him and the public at large, causing him to purchase and smoke and consume the tobacco products and become addicted.

281. In furtherance of the conspiracy, defendants and each of them deliberately abused the litigation process. They conspired to resist all discovery aimed at them, to force litigating plaintiffs to obtain a court hearing, and then demanded confidentiality orders once court rulings were obtained to prevent the rulings from becoming public

knowledge. They have demanded extensive expert and plaintiffs' depositions, and have at every juncture tried to force seriously ill plaintiffs to incur the massive costs associated with litigation while the co-conspirators pooled the costs of defense.

282. The combination of litigation tactics adopted by defendants and their suppression of the information available to them regarding the health hazards of tobacco, the addictive nature of nicotine, and their manipulation of nicotine levels and delivery, operated to discourage personal injury litigation against them, to the point where said defendants could and did assert that they never paid a cent to a personal injury claimant on account of smoking.

283. The aforementioned acts of these Defendants were extremely outrageous and were intended to deprive Plaintiff of his opportunity to make an informed decision by suppressing the results of the medical research and testing performed and the truth about their scientific data, exceeded all bounds of decency tolerated in a decent society.

284. As a direct and proximate result of Defendants' conspiracy to commit fraud and misrepresentation, Plaintiff suffered and continues to suffer addiction to the chemical substance nicotine contained in tobacco product, impairment to lung function known as "dyspnea", inability to breath except in an upright position known as "orthopnea", damage to his lungs, premature aging to his lungs, difficulty breathing, chest pain, physical distress, depression, extreme anguish, nervousness, tension, anxiety, and loss of sleep, all to his damages in an amount which is not fully ascertained but within the jurisdiction of this Court, according to proof at trial.

285. The conduct of Defendants as described herein was willful, oppressive and malicious, thereby entitling Plaintiff to an award of punitive damages in an amount appropriate to punish and make an example of them for their reckless, wanton and willful disregard to Plaintiff's safety as well as the public at large in the manufacture, design and manipulation of nicotine, a toxic and hazardous substance.

WHEREFORE, Plaintiff seeks relief as set forth below.

**FOR AN EIGHTH CAUSE OF ACTION**

**AGAINST ALL DEFENDANTS**

**EQUITABLE RELIEF**

As an eighth, separate and distinct cause of action, Plaintiff, MAHER W. SOLIMAN, complains against said Defendants and each of them, and for a cause of action alleges as follows:

286. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 285, inclusive as though fully set forth herein.

287. Plaintiff has no adequate remedy at law to recover future medical costs for diseases which is very likely and rather certain that he will contract as a result to his exposure to the toxic chemical substance of nicotine which is contained within the tobacco smoke of which he is addicted.

288. With great dismay, Plaintiff is currently addicted to the toxic chemical substance of nicotine in cigarettes and in all likelihood and rather certain, he will develop serious illness including, but not limited to, lung cancer, heart related illness, emphysema among many other serious illness. Plaintiff is entitled to a special medical fund to cover his future care and treatment due to his addiction.

289. Defendants and each of them should be declared responsible by this Court to establish and finance a medical fund and to pay for all medical treatment required of which was caused by Defendants' outrageous conduct.

290. The need for such future medical care is certain and the burden should be shifted and assigned to the Defendants herein, the responsible party.

WHEREFORE, Plaintiff seeks relief as set forth below.

**PRAYER**

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For general and compensatory damages in an amount in excess One Hundred Million ($100,000,000) Dollars, according to proof;

2. For an award of punitive damages in an amount in excess of One Hundred Million ($100,000,000)

Dollars, according to proof and sufficient to make an example of all Defendants;

3. Equitable Relief in a medical fund for all future health care costs;

4. For attorneys' fees and costs of litigation; and

5. For such other and further relief as this Court may deem just and proper.

Dated: September 14th, 2000

_____

MAHER W. SOLIMAN
PLAINTIFF IN PROPRIA PERSONA

## RELEVANT STATUTORY PROVISIONS

The California Business and Professions Code provides in relevant part:

17200. Definition.

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

17201. Person.

As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

17202. Specific or preventive relief.

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

17203. Remedies and jurisdiction.

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

17204. Injunction prosecuted by Attorney General, district attorney, or city attorney.

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions in-

volving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

17205. Cumulative penalties.

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

17206. Civil penalty for violation of chapter.

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action. Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject

of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

17207. Violation of injunction.

(a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the

county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action. Before any penalty collected is paid out pursuant to subdivision (c), the amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency. 17208. Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

17500. False or misleading statements generally.

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is

known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

17506. "Person."

As used in this chapter, "person" includes any individual, partnership, firm, association, or corporation.

§ 17535. Injunction against violations; Restitution.

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

STATE OF MINNESOTA COUNTY OF RAMSEY

The State of Minnesota,
By Hubert H. Humphrey, III,
Its Attorney General

and

Blue Cross and Blue Shield of Minnesota,
Plaintiffs,

vs

Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
Brown & Williamson Tobacco Corporation,
B.A.T. Industries, p.l.c.,
British-American Tobacco Company Limited,
BAT (U.K. & Export) Limited,
Lorillard Tobacco Company,
The American Tobacco Company,
Liggett Group, Inc.,
The Council for Tobacco Research-U.S.A., Inc.
and The Tobacco Institute, Inc.,

DISTRICT COURT SECOND JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL Court File No. C 1-94-8565

REPORT OF SPECIAL MASTER:
FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDATIONS REGARDING
NON-LIGGETT PRIVILEGE CLAIMS

Defendants.

Hearings on the above-named matter took place on October 15, 1997 through October 18, 1997, before Special Master Mark W. Gehan. Roberta Walburn, Esq., Michael

Ciresi, Esq., and Corey Gordon, Esq., appeared and argued on behalf of Plaintiffs. Noel Clinard, Esq., William Allinder, Esq., William Plesec, Esq., James Goold, Esq., George Anhang, Esq., Leslie Wharton, Esq. Craig Proctor, Esq., Philip Cohen, Esq., John Getsinger, Esq., Tom McCormack, Esq., David Martin, Esq., Steve Klugman, Esq., Michael Corrigan, Esq., Ann Walker, Esq., Cheryl Ragsdale, Esq., Cynthia Cecil, Esq. and James Munson, Esq. appeared and argued on behalf of their respective clients, Defendants herein, with the exception of Liggett Group, Inc.

Members of the public and media also attended and observed the proceedings.

The hearings of October 15th through October 18, 1997 represented a continuation of privilege hearings which were begun on July 16th through July 18, 1997. As a result of the earlier hearings, I made a report to Judge Fitzpatrick, including findings, conclusions and recommendations, dated September 10, 1997. (CLAD 1321). To any extent that that report is not inconsistent with this report, I herewith incorporate it by reference. 1. Product liability litigation involving more than one of the major cigarette manufacturers began in March, 1954 when the smoking and health lawsuit, Lowe v. R.J. Reynolds. et al., was filed. See Affidavits of James W. Dobbins, ¶ 8 (6/20/96). The defendants have engaged in a joint defense effort and share information in furtherance of common legal interests since at least 1954. See Affidavits of James W. Dobbins, ¶ 15 (6/20/96); Denise F. Keane, ¶ 6 (6/20/96); Ronald F. Bianchi, ¶ 15 (4/7/97); Arthur J. Stevens, ¶ 14 (4/7/97); Lawrence E. Savell, ¶ 14(6/20/96); Susan B. Saunders, ¶ 10(6/19/96); William Adams, ¶ 9 (6/19/96); and Declaration of Alexander Holtzman, ¶ 4 (5/15/96). The defendants'coordinated defense efforts have included meetings among counsel, exchanging materials prepared in anticipation of litigation, and identifying and consulting with potential expert witnesses. Id. In 1964, the first smoking and health lawsuit involving the Councilfor Tobacco Research - U.S.A., Inc. ( [1]CTR") and the Tobacco Institute,

Inc. ("TI") as co-defendants, Fine v. Philip Morris Inc.. et al, was filed. See Affidavit of Lawrence E. Savell, ¶ 13 (6/20/96). Since 1954, smoking and health litigation has been pending continuously against one or more of the major cigarette manufacturers, CTR and TI. Id. at ¶ 9;

Affidavits of James W. Dobbins, ¶ 8 (6/20/96); Ronald F. Bianchi, ¶ 8 (4/7/97); and Arthur J. Stevens, ¶ 8 (4/30/96). Such litigation has raised recurring factual and legal issues common to the defendants, including allegations of injury from smoking and the use of false statements in cigarette advertising, among others. See Declaration of Alexander Holtzman, ¶ 5 April, 1997 and Declaration of Philip H. Cohen, Liggett Exhibits A, B and M, May 23, 1997.

2. In the 1950's, regulatory activities (apart from continuing antitrust scrutiny) affecting the cigarette industry as a whole began to accelerate. Such activities have continued unabated from the 1950's to the present and have occurred on a federal, state, local and international level. These activities have involved a wide variety of federal regulatory agencies including the Federal Trade Commission ("FTC"), the Federal Communications Commission ("FCC"), the Food and Drug Administration ("FDA"), the Civil Aeronautics Board ("CAB") and the Environmental Protection Agency ("EPA") among others, Defendants' Liggett Exhibit 37. The activities have covered a wide range of issues, including cigarette advertising; placement and use of health warning notices on cigarette packages and in cigarette advertising; placement and use of tar and nicotine yields on cigarette packages and in cigarette advertising; restriction and prohibition of broadcast cigarette advertising; testing of cigarettes for tar, nicotine and carbon monoxide yields; excise taxes; reporting of ingredients used in cigarette manufacturing; restriction and prohibition of smoking aboard commercial aircraft, interstate buses and interstate trains; and, smoking in public place, among others.

3. A review of the documents at issue and exhibits

submitted by defendant establishes that federal regulatory activities since the 1950's involving the cigarette industry have included disputes between federal regulatory agencies (predominantly the FTC) and the major cigarette manufacturers. These disputes have involved a variety of issues such as cigarette advertising content and placement, broadcast cigarette advertising, the authority of the FTC to issue orders to file special reports and authority of the FTC to promulgate regulations.

4. Legislative activities on the federal level affecting the cigarette industry began in at least 1957 with the "Blatuik hearings," which addressed the disclosure of tar and nicotine yields in advertising. Since 1965, the defendants have monitored proposed legislation raising issues of common interest to the industry and have attended and testified at hearings regarding a wide variety of proposed and existing legislation. ~, ~ Defendants' Liggett Exhibit 38.

5. Plaintiffs' request that I find Defendants to have waived their joint defense/common interest claims to their documents because Plaintiffs claimed Defendants have violated my orders requiring the production of joint defense agreements upon which Defendants rely or which are relevant to the documents at issue. On October 27, 1997, I filed an Order with Judge Fitzpatrick (CLAD 1588) in which I recommended that he consider the imposition of sanctions, and in the absence of judicial direction, I do not consider it appropriate at this time to impose the remedy which Plaintiffs have requested.

6. Defendants are not relying on their written joint defense agreements as support for the assertion of their joint defense/common interest claims.

7. The joint defense/common interest privilege does not require a written agreement. As long as parties are "allied in a common legal cause," shared communications and work product are protected by the privilege. In re

Renents of the University of Californi4 101 F.3d 1386, 1389, 1390-91 (Fed. Cir. l996), ~t. enjed, 117 5. Ct. 1484(1997). The joint defense/common interest privilege also covers legal advice and strategy relating to regulatory or legislative proceedings In Re Sealed Case, 107 F.3d 46 (D.C. Cir. 1997). When, as in this case, joint defense efforts have been undertaken by the parties and their respective counsel, work product exchanged between counsel and confidential communications related to that common interest are protected from disclosure by the privilege. ~ United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. l989)~ remand, 738 F. Supp. 654 (E.D.N.Y. 1980) affd , 924 F.2d 443 (2d Cir. 199 1)cert. denied, 502 U.S. 810(1991). This presupposes, of course, that the communications and work product are privileged in the first place.

8. By an order dated May 9, 1997, Judge Fitzpatrick of the Ramsey County Minnesota District Court concluded that plaintiffs had established a urima facie case of crime-fraud in this case, sufficient to permit an in camera inspection of documents and to create the need for additional proceedings to permit the defendants an opportunity to rebut plaintiffs' evidence. At hearings which occurred on October 15 through October 18, 1997, the defendants offered evidence to respond to plaintiffs' prima facie showing. During these hearings, some evidence and argument was offered on an in camera basis, i.e., plaintiffs and other defendants were excluded from the proceedings.

9. In the early 1950's, several researchers reported the results of laboratory and epidemiological studies that, they claimed, linked smoking to disease. See Affidavit of Kenneth M. Ludmerer, M.D., February 12, 1997.

10. On January 4, 1954, in response to widespread publicity generated by these studies, the major cigarette manufacturers (except Liggett) and other tobacco-related organizations caused "A Frank Statement to Cigarette Smokers" to be published in numerous newspapers. The

"Frank Statement" stated that these companies were forming a joint industry group," to be known as the Tobacco Industry Research Committee ("TIRC"), 1954 Frank Statement, P1. Ex. 2(1).

11. Because of concerns relating to a long history of antitrust difficulties and litigation dating back to at least 1911, representatives of the tobacco industry invited the United States Department of Justice ("DOJ") to meet with them to discuss the formation of TIRC. Although DOJ declined to attend this meeting, the tobacco companies kept DOJ advised as to the industry's joint research efforts through CTR and in January 1954 provided DOJ with a copy of CTR's "Statement of Purpose." See Affidavit of Irwin Tucker, January 28, 1997 ¶ 4Jj11 Camera and Ex Parte Affidavit of Edwin J. Jacob, ¶¶ 48-5 1. (2/15/97)

12. In 1964, TIRC changed its name to The Council for Tobacco Research --U.S.A. In 1971, The Council for Tobacco Research -- U.S.A., Inc. wasincorporated. See Affidavit of Glenn, ¶ . These organizations collectively are referred to herein as "CTR."

13. The uncontroverted evidence before the Court establishes that: (1) the major U.S. tobacco companies, other than Liggett, have been members of CTR since 1954 See Affidavit of Glenn, ¶¶ 6, 8.

14. Continuously since 1954, CTR has acted as a joint industry group for the tobacco companies that are its members. (CTR's principal function throughout that time has been to fund scientific research by receiving monies from the tobacco companies and providing them to scientific investigators.) ~ Affidavit of Glenn, ¶¶ 6-9~ See Affidavit of McAllister, ¶ 7.

15. Plaintiffs have produced evidence that the defendants have acted in concert for their mutual benefit and defense, at least since 1954, when each of the defendants

with the exception of Liggett (the "defendants" or the "non-settling defendants"), published a document under the name Tobacco Industry Research Committee, now the defendant The Counsel for Tobacco Research - U.S.A., Inc. ("CTR"). This document, entitled "A Frank Statement to Cigarette Smokers" ("Frank Statement"), challenged the "theory that cigarette smoking is in some way linked with lung cancer in human beings." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 1, Plaintiffs' Ex. 2(1) (CTR MN 11309817).

16. In the "Frank Statement," the non-settling defendants made the following statements, among others: We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We always have and always will cooperate closely with those whose task it is to safeguard the public health. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. The "Frank Statement" also made three specific promises:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. Thisjoint financial aid will of course be in additional to what is already being contributed by individual companies.

2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.

3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

17. In December 1970, the Tobacco Institute ran a statement declaring that "[from the beginning, the tobacco industry has believed that the American people deserve objective scientific answers." Plaintiffs' Tab 3, Plaintiffs' Ex. 5(1), TIMN 0081352. The statement also represented that "in the interest of absolute objectivity, the tobacco industry has supported totally independent research with completely non-restricted funding" and that "the findings are not secret." Id.

18. In 1971, the Tobacco Institute in a press release stated, in reference to finding the "keys" which might unlock the door between statistical evidence and causation. Any organization in a position to apply resources in the search for those keys - and which fails to do so - will continue to be guilty of cruel neglect of those whom it pretends to serve.
Hearings before Judge Fitzpatrick, April 8 and April 15, 1997~?laintiffs' Tab 4, Plaintiffs' Ex. 6(1), LG 0069275 at 0069279.

19. In a 1972 Wall Street Journal article, James Bowling, a Vice Presidentof Defendant Philip Morris, Inc., ("PM") was quoted as saying: If our product is harmful... we'll stop making it. We now know enough that we can take anything out of our product, but we don't know what ingredients to take out. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997~laintiffs' Tab 5, Plaintiffs' Ex. 7(1),

RJR 500324162 at 500342163.

20. In 1982, the Tobacco Institute published a pamphlet in which it wrote:

Since the first questions were raised about smoking as a possible health factor, the tobacco industry has believed that the American people deserve objective, scientific answers. The industry has committed itself to this task. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997;

Plaintiffs' Tab 49, Plaintiffs' Ex. 8(1), B&W 670500617.

21. In 1990, a public relations employee of Defendant R.J. Reynolds Tobacco Company ("RJR") wrote a letter to a person by the name of Rook in Minnesota, apparently in response to a letter from Rook. The public relations employee asserted in that letter that ..... scientists do not
know the cause or causes of the chronic diseases reported to be associated with smoking." The letter went on: Our company intends, therefore, to continue to support [research] in a continuing search for answers.
Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Ex. 9(1), RJR 507703861-03862.

22. One way in which the industry publicly stated that it would fulfill this promise to conduct and disclose objective research was through the auspices of the CTR (originally named the Tobacco Industry Research Council, or TIRC). Internal documents, however, imply that top officials from the tobacco industry privately acknowledged that, contrary to the public representations, CTR was meant to serve primarily a public relations function and that CTR scientific research was of little value in addressing issues relating to the causal link between smoking and health. For example:

23. In May 1958, a BAT scientist (and others from the British tobacco industry) visited representatives of the U.S. industry and found that, Liggett & Meyers stayed out of T.I.R.C. originally because they doubted the sincerity of T.I.R.C.'s motives and believed that the organization was too unwieldy to work efficiently. They remain convinced that their misgivings were justified. In their opinion T.I.R.C. has done little if anything constructive, the constantly reiterated "not proven" statements in the face of mounting contrary evidence has thoroughly discredited T.I.R.C., and the S.A.B. of T.I.R.C. is supporting almost without exception projects that are not related directly to

smoking and lung cancer. Hearings before Judge Fitzpatrick, April 8 and April 15, l997Plaintiffs' Tab 7, Plaintiffs' Ex. C(2), p. 5, BAT 105408490 at 8494. As used herein, the term "BAT" refers to defendants B.A.T. Industries P.L.C., British-American Tobacco Company Limited, and/or BAT (U.K. & Export) Limited.

24. In another trip report written in 1964 by British scientists, it was stated:[Bloth L&M and Lorillard scientists told us quite bluntly that they considered TRC [the British trade group] research was on the correct basis and CTR largely without value. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 11, Plaintiffs' Ex. 23(3), p. 17, PM 1003119099 at 9115.

25. In 1967, W.W. Bates, Jr., Liggett's director of research, wrote to the president of the Tobacco Institute that the smoking and health problem "is basically a scientific one." Plaintiffs' Tab 12, Plaintiffs' Ex. 12(3), LG 0208295. Bates stated however, that "So far...the major efforts of the industry have been other than scientific." Id. Bates further stated that: The CTR and AMA programs suffer from almost the same fault. Most of their projects have only a peripheral connection to tobacco use. Id. at LG 0209296.

26. In 1970, Helmut Wakeham, head of research and development of Philip Morris, wrote a memorandum to the president of Philip Morris, Joseph Cullman. In this memorandum, Wakeham discussed the raison d'etr of CTR. Wakeham wrote: It has been stated that CTR is a program to find out the truth about smoking and health.' What is truth to one is false to another. CTR and the Industry have publicly and frequently denied what others find as truth.' Let's face it. We are interested in evidence which we believe denies the allegations that cigarette smoking causes disease.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 14, Plaintiffs' Ex. 14(3) (PM 2022200161, 2022200162).

27. A 1970 document discloses that another top Philip Morris scientistalso questioned the worth of CTR research:
Osdene's view (Philip Morris' view?) was that C.T.R. did apparently no useful work and cost a vast amount of money.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 13, Plaintiffs' Ex. 13(3), p. 2, BAT 110316203 at 204. (Thomas Osdene was e~enior research and development scientist at Philip Morris.)

28. After a 1973 trip to the U.S., scientists from England wrote that: It is difficult to avoid the sad conclusion that C.T.R. has become a backwater of little significance in the world of smoking and health. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 15, Plaintiffs' Ex. 15(3), p. 28, BAT 100226995 at 7022.

29. Alexander Spears, research director at Lorillard Tobacco Company ("Lorillard"), explained to Curtis H. Judge, the chief executive officer, in a 1974 memorandum:

Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for purposes such as public relations, political relations, position for litigation, etc... .In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious strategy. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 16, Plaintiffs? Ex. 34(1), p. 3, Lor 01421596 at *598.*

30. A memorandum written in November 1978 from Philip Morris executive Robert Seligman contained the following historical account showing that CTR was not set up to conduct objective research:

Bill Shinn [attorney at Shook, Hardy] described the

history, particularly in relation to the CTR. CTR began as an organization called Tobacco Industry Research Council (TIRC). It was set up as an industry "shield" in 1954... .CTR has helped our legal counsel by giving advice and technical information, which was needed at court trials. CTR has provided spokesmen for the industry at Congressional hearings. The monies spent on CTR provides a base for introduction of witnesses.

Getting away from the historical story, Bill Shinn mentioned that the "public relations" value of CTR must be considered and continued.... A very interesting point, made by Bill Shinn, is the opposition's, "the case is closed with regard to smoking and disease.". ..It is extremely important that the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed... .There is a CTR' basket that must be maintained for PR purposes.

31. One handwritten note, believed to be written by Addison Yeaman, the chairman of CTR, summed up the fact that CTR was created to protect the industry, not the public health. These notes, entitled CTR Meeting," state: CTR is best and cheapest insurance the tobacco industry can buy, and without it the industry would have to invent CTR or would be dead. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 17, Plaintiffs' Ex. 16(3), Lor 03539541.

32. There also is evidence that for years the industry acted in concert to suppress or eliminate internal research on smoking and health, notwithstanding the industry's public representations to conduct research into "all phases of tobacco use and health" and report all facts to the public. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 1, Plaintiffs' Ex. 2(1), CTRIVIN 11309817.

33. In 1968, Philip Morris director of research

Wakeham described a "gentleman's agreement? under which the companies had agreed to refrain from conducting in-house biological experiments on tobacco smoke. Wakeham stated: We have reason to believe that in spite of gentleman's agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 18, Plaintiffs' Ex. G(2), p. 4, PM 1001607055 at 058.

34. A 1970 memo by D.G. Felton, a BAT senior scientist, also referenced this "tacit agreement" not to conduct in-house biological research. Plaintiffs' Tab 19, Plaintiffs' Ex. 24(3), p. 2, BAT 110315968 at 969. This memo further described how this "tacit agreement" led one company -- Philip Morris -- to direct another company -- RJR -- to shut down its in-house biological work. After learning that RJR was conducting biological studies, Philip Morris president Cullman lodged a complaint with RIR president Galloway. The result was a "sudden reorganization at Reynolds, resulting in the closure of the biological section" Id pp. 2-3. This later became known as the "mouse house" incident.

35. An April 1980 letter from Robert Seligman, a top executive in research and development at Philip Morris, to Alexander Spears, a senior scientist at Lorillard, listed potential areas of scientific research for the industry. Seligman included a list of "subjects which I feel should be avoided." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 20, Plaintiffs' Ex. 20(3), p. 1, Lor 01347175. The list entitled "Subjects To Be Avoided" included:

1. Developing new tests for carcinogenicity.

2. Attempt to relate human disease to smokinu. li~ p. 3 (emphasis added).

36. Plaintiffs have presented substantial evidence showing involvement in scientific research and other scientific matters by attorneys for the tobacco industry, and that industry attorneys were a driving force behind the direction of and the suppression of scientific research. For example:

37. In 1978, Sheldon Sommers, M.D., who was then Chairman of the CTR Scientific Advisory Board, complained to William Gardner, who was then the Scientific Director for CTR, that he [Sommers] was unable to understand the legal counsel he was being given. The import of Sommers' letter was that the CTR lawyers were controlling tobacco research by CTR based upon legal considerations. Hearings before Judge Fitzpatrick, April 8 andApril 15, 1997; Plaintiffs' Tab 27, Plaintiffs' Ex. 33(1), CTR SF 0800031. Sommers also stated: I think CTR should be renamed Council for Legally Permitted Tobacco Research, CLIPT for short. Id.

38. A hand-written memorandum dated April 21, 1978, produced from the files of defendant Lorillard, complains that: We have again abdicated the scientific research directional management of the Industry to the "Lawyers" with virtually no involvement on the part of the scientific or business management side of the business. Hearings before Judge Fitzpatrick, April 8 and April *15*, 1997; Plaintiffs' Tab 28, Plaintiffs' Ex. 25(3), LOR 01346204.

39. A 1976 internal memo by a tobacco scientist at BAT, S.J. Green, also discusses the extent to which "legal considerations" dominated scientific research: The public position of tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations. By repudiation of a causal role for cigarette smoking in general they [the companies] hope to avoid liability in particular cases. This domination by legal consideration thus leads the

industry into a public rejection in total of any causal relationship between smoking and disease and puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research etc. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 35, Plaintiffs' Ex. 39(1), BAT 109938433.

40. A 1964 trip report by English scientists described how a powerful committee of U.S. lawyers was dominant in the smoking and health arena: This Committee is extremely powerful; it determines the high policy of the industry on all smoking and health matters - research and public relations matters, for example, as well as legal matters - and it reports directly to the presidents. The lawyers are thus the most powerful group in the smoking and health situation. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 11, Plaintiffs' Ex. 23(3), p. 7, PM 1003119099 at 105, 106. This Committee, later known as the Committee of Counsel, also was involved in "clearing papers (e.g. Dr. Little's annual report)."j~.. Dr. Little was the first director of CTR; thus, a powerful committee of lawyers was involved in "clearing" CTR's annual reports on scientific research.

41. In his in camera and ex parte affidavit, Edwin Jacob, long-time counsel for CTR writes:

The decision to fund research created the related questions of whether that research should be performed internally or by outside researchers and, if the research was to be performed by outside researchers, whether the companies should direct the research or have it directed by others. The companies concluded that internal research or research conducted by outside researchers under industry contracts would not be given proper credit if, as they expected, it supported their belief regarding causation. Conversely, if the results were equivocal, the parts suggesting causal possibilities would be exaggerated. Further, the companies were concerned that, if the

companies conducted research only internally, some would claim that they were pursuing the research half-heartedly, pursuing it improperly, or suppressing the results. Accordingly, the companies determined that the most effective and efficient way for the companies to conduct this research was to fund outside researchers selected by a board of eminent, independent scientists.

42. It appears that one method by which attorneys may have controlled research is through maneuvers intended to "create" privileges. In November, 1979, the corporate counsel for B&W, Kendrick Wells, wrote a memorandum to Ernest Pepples, B&W's vice president of law. Plaintiff Ex. 43(1), PM 2048322229. In this memorandum, Wells outlined a plan to wrap scientific information in attorney-client privilege. Mr. Wells' proposal specifically provided that ". . . in the operational context BAT would send documents without attempting to distinguish which were and which were not litigation documents." PM 20483222230.

43. Defendants also presented evidence at the three days of Liggett hearings showing that scientific research is directed into different classifications, with some scientific research being withheld on the basis of privilege. Defendants' Liggett Exhibit 4ldepicts how "Industry Counsel" directed three categories of research: "Special Account Recipients (Confidential Consultants)," "Special Account Recipients" and "Special Projects Recipients."

44. The defendants and their representatives have, in fact, been aware that cigarette smoking is probably hazardous to the health of the smoker. A statistical association between smoking and illness has been conceded by the defendants, but there has been a long-standing scientific and public relations dispute as to whether one can infer "causation" from such an association.

45. For example, in April and May of 1958, three British scientists (including at least one from BAT, D.G. Felton) visited top officials and scientists in the U.S. tobacco industry, including those at TIRC, Liggett, Philip Morris and the American Tobacco Company. Plaintiffs' Tab 7, Plaintiffs' Ex. C(2), p. 1, BAT 105408490. One object of the visit was to find out "the extent in which it is accepted that cigarette smoke causes' lung cancer." ~, p. 2. The British scientists reported widespread acceptance of causation: With one exception (H.S.N. Greene) If not formally affiliated with any tobacco company] the individuals with whom we met believed that smoking causes lung cancer if by "causation" we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link. In the U.S.A. only Berkson, apparently, is prepared now to doubt the statistical evidence and his reasoning is nowhere thought to be sound. j~., p. 2. The authors concluded that there was no serious dispute that the statistical associations constituted a "cause and effect" phenomenon: Although there remains some doubt as to the proportion of the total lung cancer mortality which can be fairly attributed to smoking, scientific opinion in the U.S.A. does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship. Id~p. 8.

46. In 1959, an RJR scientist, Alan Rodgman, concluded that there is a "distinct possibility" that substances in cigarette smoke could have a carcinogenic effect. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Ex. 21(1), RJR 500945942.

47. In 1962, Rodgman wrote: The amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming, [while] the evidence challenging the indictment is scant. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 32, Plaintiffs' Ex. 22(1), p. 4, RIR 504822847 at 504822850.

48. In 1964, Philip Morris scientist Wakeham examined

the first Surgeon General's Report -- which found that smoking was causally related to lung cancer in men -- and found that "little basis for disputing the findings at this time has appeared." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 33, Plaintiffs' Ex. 24(1), p. 1, PM 1000335612. Wakeham commented on "[t]he professional approach" of the Surgeon General's committee. Id., p. 2.

49. In 1967, G.F. Todd of the Tobacco Research Council [the British counterpart to TIRC/CTR] wrote a letter to Mr. Addison Yeaman, the vice president and general counsel of Brown & Williamson Tobacco Corporation. In his letter, Todd observed: The only real difficulties that we encountered arose out of the unavoidable paradox at the centre of our operations - namely that, on the one hand the manufacturers control TRC's operations and do not accept that smoking has been proved to cause lung cancer while, on the other hand, TRC's research program is based on the working hypothesis that this has been sufficiently proved for research purposes. In addition, the Council senior scientists accept that causation theory .. . We have not yet found the best way of handling this paradox. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 34, Plaintiffs' Ex. 26(1), LG 298942 at 298943.

50. In October 1976, BAT scientist S.J. Green criticized the industry's public position on causation: The problem of causality has been inflated to enormous proportions. The industry has retreated behind impossible demands for scientific proof whereas such proof has never been required as a basis for action in the legal and political fields. Indeed if the doctrine were widely adopted the results would be disastrous. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 35, Plaintiffs' Ex. 39(1), p. 1, BAT 109938433. Dr. Green concluded that "It may therefore be concluded that for certain groups of people smoking causes the incidence of certain diseases to be higher than it would otherwise be." Id., p. 4.

51. In 1979, P.N. Lee of BAT expressed his impressions of a 1979 Surgeon General's report dated January 11, 1979. In this memorandum, Lee considered at length the Tobacco Institute publication entitled "The Continuing Controversy," also identified as TA73. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 48, Plaintiffs' Ex. 28(1), BAT 100214029, beginning at 100214045. That document itself is identified as TIMIN 84430. Lee characterized the report as "misleading." He wrote that the report did~ appear to understand what causation is. Lee wrote: Discussion of the role of other factors can be particularly misleading when no discussion is made of relative magnitudes of effects. For example, heavy smokers are observed to have 20 or more times the lung cancer rates of non-smokers. Sure, this does not prove smoking causes lung cancer, but what it does mean, and TA73 never considers this, is that for any other factor to explain this association, it must have at least as strong an association with lung cancer as the observed association for smoking (and be highly correlated with the smoking habit).

TA73 seems ready to accept evidence implicating factors other than smoking in the aetiology of smoking associated disease without requiring the same stringent standards of proof that it requires to accept evidence implicating smoking. This is blatantly unscientific.

BAT 100204046.

52. In fact, in 1980 BAT considered breaking ranks with the industry and admitting that smoking causes disease because BAT acknowledged that the "no causation" position was not credible:

The company's position on causation is simply not believed by the overwhelming majority of independent observers, scientists and doctors. The industry is unable to argue satisfactorily for its own continued existence because

all the arguments eventually lead back to the primary issue of causation, and on this point, our position is unacceptable.

Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 36, Plaintiffs' Ex. 30(1), p. 2, BAT 109881322 at 323. The countervailing interest to this break from the industry's public dogma was the "severe constraint of the American legal position." li~ p. 10.

53. In 1982, a BAT consultant, Francis Roe, found the industry position on causation "short of credibility," noting that "[it is not really true, as the American Tobacco industry would like to believe, that there is a raging worldwide controversy about the causal link between smoking and certain disease." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 37, Plaintiffs' Ex. 79(3), BAT 100432193.

54. Notwithstanding these internal documents, the industry's public relations strategy has been to deny causation and to keep the controversy alive.

*55* Over the years, tobacco industry spokespersons made many comments clearly intended to create doubt as to a connection between smoking and illness. For example:

56. In 1962, the Tobacco Institute issued a press release stating that: The causes of cancer are not now known to science. Many factors are being studied along with tobacco. The case against tobacco is based largely on statistical associations, the meanings of which are in dispute. Hearings before Judge Fitzpatrick, April 8 and April 15, l997~?laintiffs' Tab 2, Plaintiffs' Ex. 4(1),

PM 1005136953.

57. In 1969, a CTR press release stated: There is no demonstrated causal relationship between smoking and any disease... .If anything, the pure biological evidence is

pointing away from, not toward, the causal hypothesis. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 40, Plaintiffs' Ex. 12(1), B&W 670307882.

*58.* In 1970, a CTR press release said: The deficiencies of the tobacco causation hypothesis and the need of much more research are becoming clearer to increasing numbers of research scientists. Hearings before Judge Fitzpatrick, April 8 and April *15,* 1997; Plaintiffs' Tab 41, Plaintiffs' Ex. 13(1), RJR 50001 5901.

59. In 1970, a Tobacco Institute advertisement stated: After millions of dollars and over 20 years of research: The question about smoking and health is still a question. Hearings before Judge Fitzpatrick, April 8 and April 15, 19974~laintiffs' Tab 3, Plaintiffs' Ex. 5(1), TIMIN 0081352.

60. In 1972, a Tobacco Institute press release, stated: The 1972 report of the Surgeon General...'insults the scientific community'...[T]he number one health problem is not cigarette smoking, but is the extent to which public health officials may knowingly mislead the American public." Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 44, Plaintiffs' Ex. 14(1), TIMN 012062.

61. In 1977, a Tobacco Institute pamphlet stated: Has the Surgeon General's report established that smoking causes cancer or other disease? No. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 45, Plaintiffs' Ex. 25(1), TIMN 0055129.

62. In 1978, a Tobacco Institute pamphlet stated: The flat assertion that smoking causes lung cancer and heart disease and that the case is proved is not supported by many of the world's leading scientists. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 44, Plaintiffs' Ex. 14(1), TI 120602.

63. In 1979, the Tobacco Institute circulated a report

entitled "Smoking and Health 1964-1979: The Continuing Controversy." This report, which followed the 1979 Surgeon General's Report, stated that: The American public would be better served if high government health officials and private interest groups which encourage them abandoned the myth of waging war against diseases and their alleged causes.... Indeed, many scientists are becoming concerned that preoccupation with smoking may be both unfounded and dangerous. Unfounded because evidence on many critical points is conflicting. Dangerous because it diverts attention from other suspected hazards. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 47, Plaintiffs' Ex. 29(1), TIMN 0084430. (Internally, however, the tobacco industry acknowledged that the 1979 Surgeon General's report was "no doubt.. .an impressive document" and that "[t]he way in which the information was presented was on the whole sound, scientific and emotive." Plaintiffs' Tab 48, Plaintiffs' Ex. 28(1), at 2, BAT 100214029 at 030.) 64. In 1983, an RJR advertisement said: It has been stated so often that smoking causes cancer, it's no wonder most people believe this is an established fact. But, in fact, it is nothing of the kind. The truth is that almost three decades of research have failed to produce scientific proof for this claim...in our opinion, the issue of smoking and lung cancer is not a closed case. It's an open controversy. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Ex. 16(1), RJR 504638051.

65. On February 2,1984, the chairman of the board of RJR made the following comments as part of a panel discussion on the Nightline television program:

- It is not known whether cigarettes cause cancer. RJR 502371216.

- Despite all the research to date, there has been no causal link established [between smoking and emphysema]. RJR 502371217.

• . . .as a matter of fact, there are studies that while we are accused of being associated with heart disease, there _ have been studies conducted over ten years that would say, again, that science is still puzzled over these forces. RJR 502371217. Hearings before Judge Fitzpatrick, April 8 and April 15, 1997; Plaintiffs' Tab 50, Plaintiffs' Ex. 17(1), RJR 502371216.

66. These types of repeated statements by the tobacco industry denying or diminishing the health effects of smoking also were published in Minnesota. For example, the St. Paul Pioneer Press published the following articles:

67. On October 13, 1954, the PioneerPress quoted Timothy Hartness, chairman of TIRC, as stating that "no clinical evidence has yet established tobacco to be the cause of human cancer." Plaintiffs' Ex. 395.

68. On November 24, 1954, the Pioneer Press quoted E. A. Darr, president of RIR, as stating that "there still isn't a single shred of substantial evidence to link cigarette smoking and lung cancer directly." li

69. On April 19, 1963, the Pioneer Press quoted the director of the CTR scientific advisory board, C.C. Little, as stating: It is at present scientifically unwise and indeed may be harmful to attribute a simple definitive causative role to any one of them or to attempt to assign them relative degrees of importance. Id.

70. On February 7, 1965, the Pioneer Press quoted a tobacco industry spokesman saying that the link between smoking and disease is still unproved despite the Surgeon General's report. j~..

71. On August 17, 1968, the Pioneer Press quoted the Tobacco Institute as attacking a Surgeon General's task force for a "shockingly intemperate defamation of an industry which has led the way in medical research to seek answers in the cigarette controversy."

72. On January 4, 1971, the Pioneer press quoted Joseph Cullman III, the CEO of Philip Morris, as reiterating the industry position that cigarettes" have not been proved to be unsafe" to human health. Id.

73. On January 11, 1979, the Pioneer Press quoted the Tobacco Institute as stating that the "preoccupation with smoking may be both unfounded and dangerous... because evidence on many critical points is conflicting. . . (and it) diverts attention from other suspected hazards." Id.

74. Since 1954, one of CTR's principal activities has been to fund scientific research by independent scientists through its grant-in-aid program, under the supervision of its Scientific Advisory Board (SAB) supplemented on occasion by research contracts. See Affidavit of Glenn, ¶ 7; Affidavit of McAllister, ¶ 7. CTR itself has not conducted any scientific research. See Affidavit of Glenn, ¶ 9. Through this research program, from 1954 through 1996 CTR has provided approximately $282 million to fund over 1,500 research projects by approximately 1,100 independent scientists. ~ ¶ 16; 1996 Report of The Council for Tobacco Research -- U.S.A., Inc. p. 5.

75. The researchers who have received CTR grant funding have been affiliated with approximately 300 medical schools, universities, hospitals and other research institutions, including such prestigious institutions as Harvard Medical School, Yale School of Medicine, Stanford University, numerous institutions in the University of California system, Johns Hopkins School of Medicine, the University of Chicago Medical Center, the Scripps Research Institute, the Mayo Clinic and the Salk Institute. See Affidavit of Glenn, ¶ 9& Ex. B. The researchers who have received this



funding have not been employees of the tobacco

companies or CTR. The researchers who have received this funding have not been employees of the tobacco companies or CTR. CTR's grantees have included many distinguished scientists, three of whom have won Nobel Prizes. See Id., ¶ 10; See Affidavit of Rubin, ¶ 8 (4/25/96).

76. The evidence presented included an affidavit by Dr. Emanuel Rubin, the Chairman of the Department of Pathology at Jefferson Medical College, who has reviewed CTR's grant-in-aid program. Dr. Rubin concluded that "CTR funded excellent research by well-qualified scientists that was relevant to the scientific issues associated with tobacco use and health." See Affidavit of Rubin. 6 (2/10/97).

77. CTR's written policy provides that SAB grant-in-aid recipients are to "work with the greatest freedom," and are allowed to publish their results in scientific journals. See Affidavit of McAllister, ¶ 16 & Ex. A. CTR encourages such publication. See Affidavit of Glenn,¶ 14. Since 1956, research projects funded by CTR grants and contracts have resulted in approximately 6,100 scientific publications, many of which have been in highly respected, peer-reviewed scientific journals that are frequently cited in the scientific literature. See Affidavit of Glenn, ¶ 16; 1996 Report of the Council for Tobacco Research -- U.S.A., Inc. p. 5~See Affidavit of McAllister, ¶¶ 19-21.

78. Each year since 1956, CTR has made available to the scientific community an Annual Report containing abstracts of reports of research by CTR grant-in-aid requests that have been published in scientific journals, and a list of the research projects being funded by CTR SAB grantees. Report of the Council for Tobacco Research --U.S.A., Inc. (1956-1996)$ee Affidavit of Glenn, ¶ *l5~* See Affidavit of McAllister; ¶ 8; Sommers Cinollone Tr. 8587-88~ See Affidavit of Rubin, ¶ 7 *(4/25/96).* In this way, the research results from CTR's SAB grant-in-aid program have been shared with the scientific community.

79. There is no evidence in the record before the Court that, over the course of CTR's 43 years, CTR has prevented any of its over 1,100 SAB grantees from publishing their research findings. See Affidavit of McAllister, ¶.18.

80. There is no evidence in the record before the Court that, over the course of CTR's 43 years, any scientific research by CTR SAB grantees has been tainted by scientific impropriety, such as the falsification of data or improper reporting of research results.

81. Some of the research funded through CTR grants has led to reported findings that have linked smoking with diseases including lung cancer and emphysema, and that have supported the view that cigarettes are addictive. The evidence presentedincluded the affidavits of Dr. Rubin, who stated that "Enlumerous publications from CTR-funded research provide important information indicating adverse effects of cigarette smoking." ~ Affidavit of Rubin, ¶ 6 (2/10/97). Some of these research findings have been reported in the general media. See Affidavit of McAllister, ¶ 22 & Ex. 0; 10/22/66 Article ofthe N.Y. Times (Ex. 46). Over 250 of the scientific articles published by CTR grantees have been cited in reports relating to smoking and health of the U.S. Surgeon General (or his advisory committee), and 75 were cited in the 1996 report by the Food and Ding Administration on nicotine. See Affidavit of McAllister, ¶¶ 19, 23, 24.

82. Many of the researchers who have received CTR SAB grants have also received cofunding for their research from organizations such as the American Cancer Society, the National Cancer Institute and the National Institutes of Health. See Affidavit of Glenn, ¶¶ 11.

83. The research conducted by CTR SAB grantees has been directed to matters concerning tobacco use and health, and in particular to the causation of diseases associated with smoking. See Affidavit Rubin, ¶ 6 (2/20/97);~ Affidavit of Glenn, ¶¶ 17, 19~ See Affidavit of McAllister,¶¶ 26-28; See

Affidavit of Lisanti ¶ 22 (4/11/97). The focus of that research has shifted over the years, since 1954, in accord with changes in scientific research generally.~ Affidavit of Rubin, ¶¶ 14-15 (2/10/97); ~ Affidavit of Glenn, ¶¶ 18 19~ See Affidavit of McAllister, ¶¶ of McAllister, ¶¶ 27, 28.

84. In 1954, CTR appointed as its Scientific Director Dr. Clarence Cooke Little, a nationally known scientist. See Affidavit of Glenn, ¶ 8. Dr. Little was the founder and director of the Jackson Memorial Laboratory in Bar Harbor, Maine. He had been the President of the University of Michigan and the University of Maine, and had been the managing director of the forerunner of the American Cancer Society. ~ Affidavit of Glenn, ¶ 8. As Scientific Director of CTR, Dr. Little was responsible for CTR's scientific program. See Affidavit of Lisanti, ¶ 7 (4/11/97). Dr. Little served as CTR's Scientific Director from 1954 until 1971. See Affidavit of Glenn, ¶ 8. He was succeeded as Scientific Director of CTR by other prominent scientists. See Affidavit of Lisanti, ¶9 (4/11/97).

85. The appointment of Dr. Little as the Scientific Director of CTR was consistent with the statement in the 1954 Frank Statement that a scientist of "unimpeachable integrity and national repute" would be in charge of CTR's research activities.

86. In 1954, CTR formed a Scientific Advisory Board ("SAB") to guide its grant-in-aid program by evaluating applications for funding received by CTR. See Affidavit of Glenn, ¶ 12;h Camera and Ex Parte Affidavit of Edwin J. Jacob, ¶¶ 27-29. The SAB originally consisted of seven members, and that number has gradually increased to 15. See Affidavit of Glenn, ¶ 1 2;~ Affidavit of McAllister, ¶ 15; 1996 Report of the Council for Tobacco Research--U.S.A., Inc.

87. The members of the SAB have not been CTR employees (except for CTR's Scientific Director, who has

been both a CTR employee and a member of the SAB). ~ Affidavit of Glenn, ¶ 12. The members of the SAB have been employees of universities, medical schools and research institutions such as Harvard, the University of Chicago, Stanford, Johns Hopkins, the University of Southern California and Duke. See Affidavit of McAllister, ¶ 15; Report of the Council for Tobacco Research -- U.S.A., Inc. (1956-1996). Several current SAB members are also members of the National Academy of Science. See Affidavit of McAllister, ¶ 15. The members of the SAB have been, and are, outstanding scientists in a number of fields, including cancer research, cardiology, pulmonology, immunology and pathology. See Affidavit of Glenn, 12; Affidavit of McAllister,¶ 15; Affidavit of Rubin, ¶ 8 (2/10/97).

88. Since 1954, the SAB has advised CTR on the awarding of research grants-in-aid. The SAB reviews and evaluates grant proposals by a peer review process that is standard in the scientific community. See Affidavit of Glenn, ¶ 13. Grants that are approved by the SAB are evaluated and given a numerical score by each SAB member; the scores are compiled and the applications are ranked. See Affidavit of Lisanti, ¶ 4 (7/11/97); Affidavit of McAllister ¶ 13; Sommeifipollone Tr. 8580-83. CTR's scientific staff has the actual decision-making authority to award CTR grants-in-aid. Sommers Cinollone Tr 8583~See Affidavit of Lisanti, ¶¶ 4-6 (7/11/97); Affidavit of McAllister ¶ 13. These decisions about the award of grants have adhered closely to the SAB's ranking of grant applications. See Affidavit of Lisanti ¶ 4 (7/11/97); Affidavit of McAllister ¶ 13.

89. CTR's procedure for evaluating and awarding research grants is similar to the procedures used by organizations that fund scientific research. Sommers Cinollone Tr. 8589~See Affidavit of Lisanti, ¶ 13 (4/11/97); Affidavit of McAllister, ¶1.

90. The tobacco company representatives constitute CTR's Board of Directors. See Affidavit of Glenn, ¶ 20;

Sommers Cinollone Tr. 8594; Affidavit of Lisanti, ¶~j 17, 18 (4/11/97). However, the tobacco companies deny that they have participated in or controlled the SAB's evaluations of grant proposals, or that they have participated in or controlled CTR's decisions to award research grants-in-aid. See Affidavit of Glenn, ¶¶ 20, 23; Sommers Ciollone Tr. 8595; Affidavit of Lisanti, ¶ 19 (4/11/97); Affidavit of McAllister, ¶ 14.

91. The evidence in the record before the Court included the affidavit of Dr. Vincent F. Lisanti, a scientist who was employed by CTR from 1964 until 1994 and attended over 90 SAB meetings. See Affidavit of Lisanti, ¶¶ 15 (4/11/97). Dr. Lisanti stated: I do not believe that the SAB ever rejected a grant application because it proposed research the results of which might be detrimental to the tobacco industry. The SAB members cared about promoting science and making a contribution to scientific knowledge, not about the potential impact of any scientific research on the interests of the tobacco companies.... [M]embers of the SAB were scientists and persons of great integrity. Any statement or suggestion that the evaluations and recommendations of the SAB were controlled or influenced by tobacco company lawyers is simply false. See Affidavit of Lisanti, ¶¶ 15016 (¶¶ 4/11/97)

92. The evidence in the record before the Court also included the affidavit of Dr. James

F. Glenn, CTR's Chairman and CEO (and formerly the Scientific Director of CTR), who is a professor of surgery and a former medical school dean. Dr. Glenn stated: I am not aware of any instance during the ten years in which I have been affiliated with CTR in which any of the member companies, or any of their attorneys, have attempted in any way to influence decisions on what research will be funded as part of CTR's grant-in-aid program.

The fact is that CTR, continuously from the time that I became affiliated with it in 1 987through today, has

maintained a thoroughly independent SAB and grant-in-aid program. While our members may have opinions regarding CTR's research program and are certainly entitled to express them if they wish, I can say categorically that throughout my [ten year] tenure at CTR, the grant-in-aid program has been operated independently of industry influence. See Affidavit of Glenn, ¶¶ 23, 25 (2/12/97).

93. The evidence in the record before the Court also included an affidavit from Dr. Harmon C. McAllister, the Scientific Director and Vice President for Research of CTR, in which Dr. McAllister stated: In my 14 years of experience with CTR, I have attended 28 SAB meetings at which grants were evaluated, at which more than three thousand grant-in-aid proposals have been considered. I have also attended dozens of meetings of CTR's scientific staff where grants were awarded. Throughout that time, neither the SAB nor the scientific staff of CTR has ever considered in evaluating grant applications whether the proposed research would be likely to establish connections between smoking and disease or whether the proposed research will be favored or disfavored by the tobacco industry. Throughout that time, to the best of my knowledge there has been no participation by the tobacco companies, their employees, or their lawyers in any decisions to grant or deny funding to any investigator, to any institution, or to any research area. See Affidavit of McAllister, ¶ 14 (2/12/97).

94. The evidence in the record before the Court also included testimony at a 1988 trial by former Scientific Director of CTR, Sheldon C. Sommers, who testified as follows about how he would have reacted to the tobacco companies' playing a role in the SAB grant approval process: "[I]f it had happened at the time I was invited to join [the SAB] I would certainly not have joined and if I saw it happen or knew it was happening I would resign [from the SAB]." SommersCinollone Tr. 8595. Dr. Sommers wasa member of the SAB for 23 years, from 1966 until 1989.See Affidavit of Glenn, Ex. D.

95. With the exception of certain legal advice, and the evidence offered by Defendants as referred to below, the record does not contain evidence that lawyers determined what research would be funded by the CTR SAB grant program. ~ Affidavit of Lisanti, ¶¶ 77 (2/14/97)J$_{11}$ Camera and Ex Parte Affidavit of Edwin J. Jacob. ,¶ 41.

96. From 1978 until 1982, lawyers for CTR reviewed grant proposals to CTR that related to the effects of nicotine on the central nervous system. See Affidavit of Lisanti, ¶ 27, 29 (2/14/97); In Camera and Ex Parte Affidavit of Edwin J. Jacob, ¶ 41. During that period, CTR's lawyers provided legal advice about the funding by CTR of those proposals. The Court has reviewed in camera privileged information about the substance of that legal advice. See Affidavit of Lisanti, ¶¶29-31 (2/14/97);In Camera and Ex Parte Affidavit of Edwin J. Jacob, ¶¶ 41, 53-63.

97. The Jacob and Lisanti affidavits state that the advice given to CTR by its lawyers related to the antitrust laws. Concern about a possible violation of the antitrust laws by this joint industry group" had existed since the formation of TIRC in 1954. See Affidavit of Tucker, ¶} 4. In 1954, TIRC advised DOJ in writing that it would conform to the requirements of the antitrust laws and the consent decrees affecting the tobacco industry, that it would not "give consideration to any matters affecting the business conduct or activities of its members," and that it would be "proceeding under the advice of legal counsel selected from among the counsel or nominees of its members."

See Affidavit of Jacob, Ex. B. The Court has reviewed in camera privileged information about this antitrust concern on the part of counsel. See Affidavit of Jacob, ¶¶ 43-54.

98. Other than providing the legal advice referred to above, there is no evidence in the record before this Court that lawyers influenced the selection of research to be

funded through CTR's SAB grant-in-aid program.

99. Defendants contend that it has long been a matter of common knowledge that there are health risks associated with smoking. Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989) (quoting Rovsdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1192 (E.D. Term. 1985), , 849 F.2d 230 (6thCir. 1988),remanded in nart on other grounds); see also Cameron v. AmericanLenionPost435, 281 N.W.2d 720,722 (Minn. 1979)Paunh v. R.J. Reynolds Tobacco Co., 834F.Supp. 228,231 (N.D. Ohio 1993)All good v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172(5th Cir. 1996), cert. denied, 117 5. Ct 599 (1996); Lonkowski v. R.J. Reynolds Tobacco Co., No. 96-1192,1996 WL 888182, at *7 (W.D. La. Dec. 10, 1996)American Tobacco Co. v. Grinnell, No. 94-1227, 1997 WL 33658, at *5.6 (Tex. June 20, 1997) Consumers of Ohio v. Brown & Williamson Tobacco Corn., No. 94-3574, 1995 WL 234620, at *1(6th Cir. Apr. 19, 1995) Varuav. Brown & Williamson Tobacco Corp., No. G88-568 CA6, 1988 WL 288977, at *3 (W.D. Mich. Nov. 7, 1988); Austinv. State, 48 S.W. 305,306 (Tenn. 1898) Affdas modified sub nom.. Austinv. Tennessee, 179 U.S. 343 (1900).

100. The Surgeon General issued its first smoking and health report in 1964. The Surgeon General has subsequently issued 22 additional reports on smoking and health which discuss tens of thousands of publications in the smoking and health field.

101. Defendants also contend that Minnesotans and the State of Minnesota itself have long been aware of the risks of smoking. (See Affidavit of Michael E. Parrish, ¶~ 8 and 9, April 14,1997 (awareness of Minnesota Legislature), ¶¶ 9 - 11 and 20-24 (awareness of Minnesota's education leaders), and ¶¶ 13-17 (Minnesota newspaper articles) and Berman Expert Report, ¶ 23 ("The State of Minnesota has been aware of the health risks associated with cigarettes and smoking as early as the 1800's. . . Over the last century and a half, the State of Minnesota has claimed leadership in

smoking prevention and control.")

102. I have previously found that there was no evidence that "defendants companies conducted significant independent research, i.e., that which was not jointly sponsored through CTR." Special Master Report, at ¶ 140. I also concluded that the "failure on the part of defendants individually to investigate the safety of their product, coupled with their ongoing assurances that causation of illnesses was unproved and speculative, necessarily implicates the holding of Levinv. C.O.M.B., 469 N.W.2d 512, 515 (Minn. App. 1991)... ."Id. at ¶ 146. Defendants have appealed these findings to Judge Fitzpatrick.

103. In their written submissions and presentations during the four days of hearings, defendants submitted evidence of scientific research conducted or sponsored by the industry, apart from CTR. Plaintiffs, in turn, submitted additional evidence of suppression of in-house smoking and health research.

104. Plaintiff shave presented additional substantial evidence showing that, for many years, the U.S. manufacturing defendants failed to perform in-house smoking and health research, including biological research. Biological research is research "relating to biology or to life and living processes." Webster's New Collegiate Dictionary 152 (1990). Thus, biological research is the type of research a company would undertake to examine the safety of its products with respect to humans and, in this case, to determine whether smoking causes disease. Helmut Wakeham, a senior research official at Philip Morris, defined the type of research prohibited at the tobacco companies:

"[s]tudying a relationship which might exist between smoking and diseases such as were tabulated in the Surgeon General's report." Plaintiffs' Tab 3, Wakeham Depo., p. 91.

105. Plaintiffs also presented additional substantial

evidence that for years the industry acted in concert to suppress in-house biological research on smoking and health, notwithstanding the industry's public promise in the Frank Statement to conduct research into "all phases of tobacco use and health" and report all facts to the public. CTR MN 11309817. Moreover, the Frank Statement promised that joint research would be "in addition to what is already being contributed by individual companies." Id.

SUPPRESSION OF RESEARCH

106. American counsel represented to Judge Fitzpatrick, during a hearing on American's failure to produce scientific research in the possession of its affiliates, that American did not perform in-house smoking and health research: [I]t was the policy of The American Tobacco Company not to itself conduct smoking and health research, instead it relied on CTR and the Scientific Advisory Board. So that is an explanation for why the documents they are finding from the American Tobacco Company are what they are. Plaintiffs' Tab 1, Transcript of June 17, 1997 Hearing, p. 23.

107. American's Rule 30.02(f) designee on scientific research, Byron F. Pryce, testified during his deposition that American failed to conduct in-house biological research:

Q. During the time period that you have had a biological division, do you know what kind of work was done in that biological division?
A. Reading literature.
Q. Is that it?
A. That's about all I remember.

Q. So, it would be your testimony that at no time during your tenure from 1965 to 1994 did American Tobacco Company or its parent, American Brands, ever undertake biological research in the United States; correct?
A. We did not have any in-house biological research

program at the American Tobacco research facility.

CCC

Q. Actually, my question is: Did you do in-house research on the health aspects of tobacco?
A. No, sir.

Plaintiffs' Tab 5, Pryce Depo., pp. 45, 164.

108. Mr. Pryce, American's 30.02(f) designee on research, did not know whether any of sponsored by American at the Medical College of Virginia related to smoking and

Q. As best you recall, the Medical College of Virginia Research did not involve specific research concerning whether cigarette smoke caused cancer?
A. I don't know specifically whether it had a direct link to the direct work on cancer causation. Some of the research may have been, but it was a wide spectrum of work. All has been published, to my knowledge.
Q. American ask the Medical College of Virginia to look specifically at the issue of whether cigarette smoking causes emphysema?
A. I don't know that.
Q. Did American as the Medical College of Virginia to determine whether or not cigarette smoking causes heart disease?
A. I don't believe -- I don't know that for sure. Plaintiffs'

Tab 6, Pryce Depo., p. 166-167.

109. On December 17, 1997, Plaintiffs took the deposition of Dr. Frank Colby. Colby has a PhD in Chemistry. (Colby Depo. Trans. p. 8). Colby began working at Defendant RJR in 1951. (Colby Depo. Trans. p. 15). Colby continues to consult on the subjects of smoking and health for RJR and its law firms as the sole shareholder of Frank G. Colby & Associates. (Colby Depo. Trans. pp. 9-13).

110. In 1964 or 1965, Colby assumed responsibility at Defendant RJR for analyzing smoking and health research. (Colby Depo. Trans. pp. 56-57). Prior to Dr. Colby, this function was performed by Allen Rodgman, another long-time RIR scientist whose name also appears on thousands of privileged documents.

111. On direct examination by RJR, Dr. Colby testified that he kept his facilities relating to smoking and health from the lawyers separate from the rest of the research department. (Colby Depo. p. 236).

112. On cross examination, however, Dr. Colby testified that the literature analyses which he conducted were widely available to non-lawyers of RJR but were only "channeled through the lawyers.":

Q: Now I believe you agreed with me earlier that a company such as R.J. Reynolds has a duty to understand any dangers associated with its products; correct? A: Understand, yes.

Q: They need to have people such as yourself analyze that literature; correct?

A: Correct.

Q: And that's a duty the company has in order to adequately warn the public of any dangers associated with its products; correct?

A: I would say inform.

Q: Right. And you would also agree with me, would you not, that when you conducted your analyses of this literature after 1964, that your analysis was really done for the entire company of R.J. Reynolds, not just for the lawyers; correct?

A: It was chauneled throunh the lawyers. The smokiun and health analysis was channeled throuuh the lawyers mostly.

Q: Okay. It was channeled through the lawyers, but your analysis was widely available to management

and research scientists; --

A: Correct.

Q: So in other words, even though you chauneled your research through the lawyers, that - that analysis of research that you did was widely available to the other scientists in R.J. Reynolds; correct?

A: Yes.

Q: It was available to the public affairs department, correct?

A: Yes.

Q: And it was available to top management; correct?

A: Yes.

Q: And the same was true for Dr. Rodgman's analysis of the literature when he did it; correct?

A: Yes

Q. So the lawyers basically were used to funnel and shield this analysis you did of the research, but it was widely spread tbroughout the company; correct?

A: I wouldn't - I don't - I think I don't like the - the term "shield." It was simply a distribution system.... "Shield" implies something which I don't think is correct.

Q: Okay. So it was a distribution system that started with the lawyers but eventually went throughout the company.

A: Was available. Was also of interest, yes.

PP. 242-45 (emphasis added).

113. Defendant RIR argues in correspondence dated December 31, 1997, (CLAD 1919) that Colby and Rodgman generated and received thousands of documents and that most of these documents have been produced to Plaintiffs during discovery. The language quoted above from Colby's deposition, pp. 242-245, however, leads to precisely the inference which Plaintiffs urge the Court to make: smoking and health analysis was channeled through the lawyers, although it was also available to management and scientists.

114. During the 1950's, Reynolds scientists tried to convince Reynolds management to conduct in-house biological testing. In 1967, some 14 years after the Frank Statement, Reynolds opened the Biological Research Division, the BRD, also known as "The Mouse House." The BRD was a sophisticated in-house lab for conducting biological research, including inhalation tests, on animals, including rats, rabbits,mice and gerbils. Alan Rodgman, senior Reynolds scientists from the early 1950s, testified in his deposition:

Q. this is a recommendation to do internal research; correct?
A. Uh-huh.
Q. You said this recommendation has been made previously by Teague in 1953, by yourself in 1954,by yourself in 1955, by yourself in 1956, by yourself in 1957 -- 59 and by yourself and Dr. Nielson in 1962; correct?
A. Yes.
Q. Each of those times R.J. Reynolds turned down your request; correct?
A. That's right, then did accede to eventually.
Q. Are you talking now about that three-year period in 67 to 70 when they had the Mouse House?
A. Yeah. Well it took a little while to get the staff That's I guess when the actual research was done, but it started before then.
Q. And then they terminated that abruptly in 1970; correct?
A. Yeah, but there were reasons for that.

Plaintiffs' Tab 17, Rodgman Depo., p. 335.

115. After only three years of operation, Reynolds shut down the BRD. Preliminary results from mouse inhalation tests demonstrated emphysema. This information on emphysema was shared with Philip Morris (see

paragraph below). There is no evidence, however, that this information was disclosed to the public.

116. A 1969 memorandum written by a Philip Morris scientist, and copied to senior Philip Morris scientists, Tom Osdene and Helmut Wakeham, entitled "R.J. Reynolds Biological Research Program" states: I met Dr. Price from R.J. Reynolds at the CTR-USA meeting of December 11 and 12, 1969. He mentioned doing chronic cigarette smoke exposure studies with rats. The animals received up to 500 cigarettes and em~hvsema was produced.

Plaintiffs' Tab 17, PM 1001882748 (emphasis added).

117. Similarly, a 1968 Reynolds research report, from the director of the mouse house, to the Murray Senkus, Reynolds' research director, states: Smoking Rats

The chronic exposure of rats to smoke is continuing. The number of exposures was increased to two a day on July 16, 1968. Three rats were lost after bleeding tissues were taken for histology. No gross pathology was noted.

The histology of the tissues from the rat which had smoked TEMPO cigarettes via an indwelling tracheal cannula has been completed with the results given on the following page. A diffuse, marked em~hvsema throunhout the lungs.. Plaintiffs' Tab 18, Reynolds 515596269 (emphasis added).

118. A deposition of Reynolds' Rule 30.02(f) designee on research revealed that these test results showing emphysema were never followed up by Reynolds:

Q. The fact is, though, you never followed up on this study, did you?

A. We did not do inhalation ex -- chronic inhalation exposures in these animals, no. Plaintiffs' Tab 19, Simmons depo., p. 163.

119. Rather than conduct further in-house inhalation tests, Reynolds, in 1970, shut down the Biological Research Division and fired 26 scientists. A presentation on the closing of the BRD states:

We are here today to inform you about a significant reorganization of the Research Department and a reorientation of research programs. .

In-house biological testing in the smoking health area such as work we have been doing for the Scientific Advisory Board of the Council for Tobacco Research has been terminated. Any further biological testing that may be needed in further developing smoking machines, etc. will be referred to qualified independent research organizations....

The Biological division is being dissolved....

ccc

Altogether, 26 staff people are being terminated. Plaintiffs' Tab 20, Reynolds 503950745.

120. In his deposition, Reynolds' research director, Murray Senkus, confirmed the abruptness of the closing of the mouse house:

Q. Okay. So you basically called the people together that were in your biological testing program and said, "This is it, we're shutting it down"; correct?

A. That's what we did.

ccc

Q. At this meeting you told your employees that all your in-house biological testing in the smoking-and-

health area was being terminated; correct?
A. That's what the report says.
Q. And that's your recollection; correct?
A. Yes.

Plaintiffs' Tab 21, Senkus Depo., pp. 138-139.

121. An employee of Reynolds' Biological Research Division testified in his deposition that he was "shocked" by the abrnpt closure of the BRD:

Q. That research was suddenly terminated in 1970, was it not?
A. In March of 1970, the --the division, the biological research division, was dissolved, yes.
Q. And I believe you've testified in previous depositions that you were rather shocked by that; it came as a surprise.
A. It came as -- "shocked" is a good -- is a good expression. I was all of a sudden with three young children and no job. Right, I was quite shocked.

Plaintiffs' Tab 22, Simmons Depo., p. 149.

122. A 1970 memo by D.G. Felton, a BATCo senior scientist, described how the shutdown of the BRD was related to the industry's "tacit agreement" not to conduct in-house biological research. This agreement led one company, Philip Morris, to request that another company, Reynolds, shut down the Biological Research Division. Plaintiffs' Tab 23, BAT 110315968 at 969. After learning that Reynolds was conducting biological studies, Philip Morris president Cullman lodged a complaint with Reynolds president Galloway. The result was a "sudden reorganization at Reynolds, resulting in the closure of the biological section." j~, pp. 2-3.

123. The above conversation, Philip Morris CEO to

Reynolds CEO, was described by Helmut Wakeham, a senior Philip Morris research official, to Felton. Id. Felton is now deceased. Wakeham, in his deposition in this action, stated that he had met with Felton but that he did not remember the conversation described in the BATCo document. Plaintiffs' Tab 24, Wakeham Depo., pp. 113-16. Wakeham, however, did not deny the conversation. Id., p. 116. In addition, as noted below, Wakeham also confirmed in his deposition that there was an agreement among the tobacco companies not to conduct in-house research on smoking and health.

124. Reynolds contended during the hearings that the BRD was closed because of reasons relating to, inter alia, the company s decision not to enter the pharmaceutical or starch business. This does not explain, however, why Reynolds would terminate research specifically relating to the health effects of cigarettes, including inhalation tests on rats, which were demonstrating emphysema, or why the BRD was shut down literally overnight, with no warning to the scientists who worked there.

125. Reynolds commissioned a third-party report on the closing of the BRD. This report is known as the Brubaker Report and is being withheld on a claim of privilege. RIR 515597275.

126. I have reviewed the Brubaker report, Bates No. 5072 8500-8691. This report was commissioned by the law firm of Jones, Day, Reavis & Pogne in 1985. Paul Brubaker, PhD, was a consultant retained to report to Jones, Day on the goals and objectives of the RJR Biological Research Division (BRD). At section 10.0 of that report, a description of the operations of the division, including Brubaker's rather brief explanation of why the division was closed. Brubaker writes:

We are also not convinced after all of the research we reviewed in the Smoking and Health area that BRD was closed because of unfavorable results from their Smoking

and Health research activities. Simply stated, the Smoking and Health research program had not fully matured and was only in its infancy when the doors closed.

At 50792 8507.

Brubaker also writes:

A further review of other BRD's research program [sic], especially its' [sic] Smoking and Health research effort, its' [sic] planning documents, there was no substantial evidence that the research results carried sufficient weight to warrant closing down operations, as stated earlier.

We are not convinced that the BRD research program, however, was a well managed and administered program, based upon the planning documents reviewed to date. This could have been a signal relative to the collapse of the program in 1970. A $1 million capital expenditure could have been the straw that broke the camel's back. We remain convinced that the BRD research program was closed for economic reasons rather than for any scientific discoveries of [sic] findings.

At 50792 8655.

Brubaker's report does not contain a direct statement of his methodology in compiling the report. Specifically, there is no indication that Brubaker actually interviewed scientists involved in the BRD operations.

127. The closing of the BRD was described by the attorney for RJR during the hearings which began on October 17, 1997. Transcript pp. 569-577. RIR's explanatory narrative during the hearing is neither entirely consistent nor entirely inconsistent with that of Dr. Brubaker. This is perhaps not surprising, considering the difficulty in explaining events which occurred 27 years earlier.

However, this explanation did not suggest that the BRD was badly managed, or that its research was suspect.

128. I cannot conclude that the BRiD facility was closed down simply for business reasons. It seems to me unlikely that a facility employing so many persons would simply shut down without warning in the fashion which Plaintiffs have demonstrated. The inference of a "gentlemen's agreement" has been fairly presented and not rebutted.

129. Murray Senkus, former research director at Reynolds, testified that in his 28 years with the company Reynolds, performed in-house biological testing for only three years:

Q. From the time that the Mouse House was shut down in 1970 until the time you left RJR in 1979, did RIR undertake any biological work in-house?
A. Not that I can recall.
Q. So from 1951 to 1979, a period of approximately 28 years, RIR only did in-house biological testing for 3 of those 28 years; correct?
A. Yes.

Plaintiffs' Tab 2, Senkus depo., pp. 179-180.

130. Helmut Wakeham, senior Philip Morris research official, testified during his deposition that there was an agreement that the tobacco manufacturers would not conduct smoking and health research:

Q. What's the type of research that you understood that there was an understanding that the cigarette companies would not be doing in-house?

A. Studying a relationship which might exist between smoking and diseases such as were tabulated in the Surgeon General's report.

Plaintiffs' Tab 3, Wakeham depo., p. 91.

131. Within Philip Morris, Wakeham advocated that the company abandon its refusal to conduct in-house biological research. In 1964, in response to the Surgeon General's report, Wakeham wrote a report stating that "Competitive pressures suggest a breakup of the common front approach of the industry through the Tobacco Institute and TIRC." Wakeham also recommended that "fjt]he industry should abandon its past reticence with respect to medical research," noting that "failure to do such research could give rise to negligence charges." Plaintiffs' Tab 25, PM 1000335612 at 622.

132. In a 1968 memorandum, Wakeham again advocated establishment of in-house biological research facilities at Philip Morris: We have reason to believe while this proposal to carry out biological research and testing may seem a radical departure from previous policy and practice, we are in fact only advocating that which our competitors are also doing.

Plaintiffs' Tab 26, PM 100039670 at 671.

In an earlier draft of this memorandum, Wakeham described the existence of a "gentleman's agreement" prohibiting biological research: We have reason to believe that in spite of the gentleman's agreement from the tobacco industry in previous years, that at least some of the major companies have been increasing biological studies within their own facilities.

Plaintiffs' Tab 27, PM 1001607055 at 058. (The "increasing biological studies" referenced by Wakeham included the Reynolds BRD.)

133. Wakeham confirmed that a "gentlemans agreement" existed during his deposition:

I may have coined the word "gentlemans agreement" in writing this document. But it, in my mind, was a term I used to express this understanding between the companies that the company laboratories in general were not qualified or capable of carrying out research of the kind that was necessary to address the question of smoking and health, and that the industry had set up the Tobacco Research Council to bring together experts who would address this question and who would be supported by the industry for whatever researches they deemed desirable to do in this field.

Plaintiffs' Tab 28, Wakeham Depo., pp. 89-90.

134. Wakeham also confirmed that, as of 1968, 14 years after the Frank Statement, Philip Morris was not conducting any in-house biological research related to smoking and health:

Q. Philip Morris wasn't doing any animal testing as of 1968.

A. Absolutely not. Not in house. We were -- we were doing tests on some animals,
again related to the irritation problem, not regarding -- not relating to cancer or anything else of that nature.

Plaintiffs' Tab 29, Wakeham Depo., p. 86.

135. In a 1969 memo, Wakeham acknowledged the scientific expertise of the tobacco industry to conduct smoking and health research and lamented the fact that this expertise was not being utilized because of the legal situation:

Unfortunately.. . the scientific expertise of the industry,

because of the liability suit situation, has not been permitted to make a contribution to the problem, a contribution which I believe was and is vital....

Plaintiffs' Tab 30, PM 1001609594.

This contemporaneous memorandum contradicts Wakeham's deposition statement (years later) that the tobacco companies were not "qualified or capable" of conducting in-house research on smoking and health. ~ ¶ 52, above.

136. Plaintifl~ presented evidence that Philip Morris turned to Europe for smoking and health research. A 1970 memorandum from Joseph Cullman, the president of Philip Morris, discusses the benefits of conducting research overseas: The possibility of getting answers to certain problems on a contractual basis in Europe appeals to me and I feel presents an opportunity that is relatively lacking in risk and unattractive repercussions in this country.

Plaintiffs' Tab 31, PM 1000216742.

137. In 1970, Philip Morris purchased a research facility in Cologne known as INBIFO. A 1970 memo from Wakeham states:

Since we have a major program at INBIFO, and since this is a locale where we might do some of the things which we are reluctant to do in this country, I recommend that we acquire INBIFO either in toto or to the extent of controlling interest.

Plaintiffs' Tab 32, PM 2022244451.

138. One perceived value of INBIFO was that Philip Morris could control the results:

Experiments can be terminated at will as required

without delay.

Plaintiffs' Tab 33, PM 1003123058.

139. After Philip Morris acquired INBIFO, there is evidence that Philip Morris tried to avoid any direct contact with the research results that emanated from INBIFO.

140. A 1977 memorandum from a Philip Morris research official, Robert Seligman, describes the elimination of written contact between INBIFO and Philip Morris: We have gone to great pains to eliminate any written contact with INBIFO, and I would like to maintain this structure.

Plaintiffs' Tab 34, PM 2000512794.

141. Handwritten notes from Thomas Osdene, another Philip Morris scientist, describes methods for handling documentation concerning INBIFO:

1. Ship all documents to Cologne...
2. Keep in Cologne
3. OK to phone & telex (these will be destroyed)
4. Please make available file cabinet. Jim will put into shape by end of August or beginning Sept.
5. We will monitor in person every 2-3 months.
6. If important letters have to be sent please send to home - I will act on them & destroy.

Plaintiffs' Tab 35, PM 1000130803.

142. The "Jim" referenced in the above document was James Charles, another Philip Morris scientist. Plaintiffs' Tab 36, Charles Depo., p. 48. Charles confirmed in his deposition that Philip Morris did not retain in its files INBIFO research results:

Q. Philip Morris didn't retain its own study -- retain its own copies of the INBIFO studies?

ccc

A. Philip Morris U.S.A. would receive from lNBIFO reports of work they conducted for us at our direction. We -- we have them gnidance with what -- respect to what kind of a study we wanted hem to do. They conducted the studies. They would send us the results. We evaluated the results and return the document to INBIFO.

ccc

Q. Wouldn't it have been easier to just simply keep the documents in a file cabinet in an office -- in a room in Richmond, Virginia, instead of sending them back to Cologne?

A. Yes, it probably would have been easier.

Q. Did you ever express that to anyone?

A. I don't remember.

Plaintiffs' Tab 37, Charles Depo., pp. 50, 59.

143. These unusual arrangements for handling scientific research at INBIFO have had an effect in thwarting the discovery proceedings in this case. Judge Fitzpatrick concluded that Philip Morris's failure to search the files of Philip Morris International, Inc. and other subsidiaries (which include INBIFO) in this action was "an egregious attempt to hide information relevant to this action.

Order Granting Plaintiffs' Motion to Compel Regarding Philip Morris International, March 25, 1997, p. 9 (CLAD #826). Judge Fitzpatrick further stated that Philip Morris's "attempts at hiding documents in the morass of interlocking related organizations shall not be tolerated by this Court. Nor will the Court countenance Philip Morris's self-selected

and voluntarily provided set of documents from selected sources." kL, p. 16.

144. Although Lorillard implied in Defendants' Joint Brief that it had conducted significant smoking and health research, Lorillard subsequently stated that that was not exactly the case. In a subsequent letter, Lorillard stated, "[A] large proportion of the internal research projects listed in our brief represented product design or product development research as opposed to research into the physiological or psychological effects of cigarette smoking or nicotine." In other words, a "large proportion of the internal research" was not related to smoking and health. Plaintiffs' Tab 9, CLAD H 1497.

145. A 1978 memo written by Curtis Judge, former CEO of Lorillard, indicates that scientific research was controlled by attorneys: We have again "abdicated" the scientific research directional management of the Industry the "Lawyers" with virtuallyn~. involvement on the part of scientific or business management side of the business.

Plaintiffs' Tab 11, Lor 01346204.

146. Brown & Williamson's former research director, Robert Sanford, admitted that B&W did not conduct any in-house biological research:

Q. Brown & Williamson did not do any biological testing in-house, did it, sir?

A. Correct.

Plaintiffs' Tab 12, Sanford Depo., p. 112.

147. Another former Brown & Williamson research director, Earl Kohnhorst, also admitted that B&W did not conduct any in-house smoking and health research:

Brown & Williamson did not have information that was being developed on -- on smoking and -- and health and disease in-house. It was being executed through The Council for Tobacco Research, through this independent scientific group that I have mentioned.

Plaintiffs' Tab 13, Kohnhorst Depo., p. 350.

148. Brown & Williamson did co-sponsor research through the BAT Group in England. In 1985, however, the BAT Group terminated in-house biological research: Biological Research All animal work to be terminated a.s.a.p. Finish current work on animal tissues (inc. tissues from animals just killed) and report within 3 months.

Plaintiffs' Tab 14, BATCo 100593368.

149. At the same time the BAT Group terminated all in-house biological research, the BAT Group increased research into product modification, in particular nicotine manipulation:

All in-house animal work will cease and future studies involving animals will be done externally under contract. . . . More resources will be provided for research into means of enhancing nicotine transfer to smoke and experimental combustion research, including cigarette paper effects.

Plaintiffs' Tab 15, BAT 301122597 at 607.

150. This failure to conduct in-house biological research was not restricted to one tobacco company. As detailed above, this failure was industry-wide. I find this fact significant, as the members of this industry have portrayed the companies as being fiercely competitive.

151. Defendants directed my attention to research sponsored by defendants at Harvard University. The funding of this research was controlled by the Committee of

Counsel and executives of the companies. A 1976 letter from senior industry counsel, David Hardy, states that; In Bill Shinn's letter to you of May 21, he solicited at my request, any observations or comments that you may have with regard to the renewal of the Harvard University project. This project has been handled in the past by the Committee of Counsel and the executives of the companies, but I wanted to find out if any member of the Research Liaison Committee had any observations.

Plaintiffs' Tab 44, Lor 03748208.

152. The defendants terminated sponsorship of the Harvard University research in 1979. The chief scientist on the project, Gary Huber, in a letter to Shook, Hardy & Bacon, stated his disagreement with the termination decision: How can a research program that has been productive of good research in an important area where good research is vitally needed now be terminated? How can four maj or NIH research grants on smoking and health that were awarded under the most competitive of circumstance in areas of crucial national importance now be terminated? How can a program that again has been favorably reviewed by an advisory committee of Harvard Professors now be terminated?

Plaintiffs' Tab 46, LG 0194500 at 01.

153. On January 19, 1998, Plaintiffs' counsel sent me correspondence (CLAD 2087) in which they asked me to consider a deposition taken of Dr. Gary Huber on September 20, 1997. This deposition was taken in the case of The State of Texas v. American Tobacco Com~anv. et. al., US District Court, Eastern District of Texas.

154. Dr. Huber was the principal investigator in charge of the research program at Harvard University relating to smoking and health. The program was funded in part by a five-year grant, and a three-year extension of that

grant, from the tobacco industry.

155. Plaintiffs direct my attention to the following excerpts from the Huber transcript:

Q. Were the [Harvard] studies important information, in your opinion, when you reported those findings to scientists?
A. Yes.
Q. An did you stress their importance to industry officials?
A. Very much so.
Q. And did you want to go forward and do further studies with animals?
A. Absolutely.
Q. Why?
A. Well, we found -- we found very important results and we felt that they should be pursued and they had impact on a number of very serious and important considerations that deserved answers.
Q. Was money forthcoming from the cigarette company sponsors later for you to complete your animal studies after Harvard?
A. It was promised, but it never came.
Q. Were you, in fact, ever able to finish your experiments?
A. No.

Transcript, pp. 40-41.

Q. Did you ever have a meeting in a hotel in Boston with industry officials who expressed concern that your research was, quote, "getting too close to some things, end of quote?
A. Yes.
Q. And who was that, sir?

A. It was with industry attorneys.
Q. Can you tell us approximately when that happened,

Doctor?

A. I would anticipate it was in 1980. But I would have to check the records to be sure.

Transcript, pp. 46-47.

Q. Were the implications of your work at Harvard on human subjects with nicotine, with respect to such issues as whether or not nicotine may be a dependent-producing substance or addictive substance?

A. It would support -- it would support the concept that it was a dependent-producing substance.

Q. Did you tell officials of the cigarette companies that, the implications of what you had proved?

A. We presented it to them in great detail.

Q. And was your funding reviewed to continue that study?

A. No.

Transcript p. 56.

Q. Doctor, with respect to your study of nicotine itration or compensation, did your results provide any insight into the question of whether low tar, low nicotine cigarettes were healthier or safer than high tar cigarettes like Marlboro?

A. It raised, I think, extremely important questions and issues that we never got a chance to answer.

Transcript, p. 57.

Q. Now, Dr. Huber, do you believe, sir, that if you had been able to continue your experiments with rats with respect to the rats breathing smoke and developing emphysema, do you believe that you would have been able many years ago to have found the exact way that cigarette smoke causes

emphysema?
A. Yes.
Q. Why do you say that sir?
A. We had important information on -- that was advancing science on the mechanisms by which these processes could occur.
Q. And you requested funding from the cigarette companies to continue it?
A. Yes.
Q. It was not forthcoming?
A. Correct.

Transcript, p. 97.

156. In a responsive letter, CLAD 2098, Defendants direct my attention to portions of the Huber deposition which reflect the following testimony by Huber:

The responsibility to design and conduct the research program was the exclusive province of Dr. Huber; there was no research product suppressed.

(HuberDep. at 139:11-16.)

157. Defendants have also directed my attention to the following testimony:

Q. Okay. And all of the funding and the related research was actually carefully reviewed by an elite Harvard advisory committee, wasn't that correct? Didn't they review what you did?
A. Most of it, not all of it.
Q. Okay. And did the committee ever find any suggestion of any Tobacco Industry influence on any of your research or any of your publications?
A. No.

(Id. at *138:15-23)*

Q. Now, was your research done at Harvard, though paid for by the cigarette companies, was it a policy of full and open disclosure; that is, were you free to publish your findings?

A. Yes, we had what we called an open door policy: people could at any time, see what research work we were doing, and we were free to pursue any direction or publish any results.

(Huber Dep. at 22: 16-22)

Q. Was there any publication that you wanted to make that you were not allowed to make while you were at Harvard, by the Tobacco Industry?

A. No, sir.

(Id. at 139: 17-20)

Q. Now did you publish your findings about nicotine compensation?

A. Some yes. Or we presented them --presented and/or published them.

Q. And were you free to publish?

A. Yes.

(Id. at 17:10-15)

Q. Dr. Huber, were your findings regarding -- some of your findings regarding nicotine titration or compensation reported to scientific peers of yours?

A. Yes.

Q. And was it also reported in the newspaper article, in the Boston Globe.

A. Probably. (Id. at 19: 15-21)

Q. Did you publish, in any fashion, to scientists your findings about the rats and emphysema?

A. Yes.

(Huber Dep. at 17: 16-18)

Q. Did you personally, also, present these emphysema findings to a group of scientists in an audience?

A. Yes, on several different occasions.

(HuberDep. at 17: 24-25, 18:1)

158. Plaintiffs urge that I infer that the funding of the Harvard Research Program directed by Dr. Huber was discontinued because his research was reaching "dangerous" conclusions. Defendants in their submissions contend that the research was discontinued because of an attitude by Harvard University that was antagonistic to the tobacco industry. In support of this contention, Defendants submitted as attachments to CLAD 2098, tabs D, E, and F. Tab D is a memorandum by Dr. Huber dated May 24, 1979 which fairly could be characterized as a contemporaneous account of a meeting between Dr. Huber and Dean Daniel Tosteson of the Harvard Medical School. Huber is evidentially frustrated that Harvard University did not display an appropriately conciliatory and grateful attitude toward the tobacco industry, and that this perceived deficiency hadjeopardized the funding of Huber's program.

159. The attachment at Tab E is a second memorandum by Dr. Huber dated May 11, 1979 in which Huber describes a meeting involving himself, a Dr. First, Dean Meadow, and a Ms. Joyce Brinton. In this memorandum, it is apparent that Huber knows that the funding by the tobacco industry for his research program is in great peril. Huber learns at the meeting from Dean Meadow that the tobacco industry, and presumably its money, are not welcome at Harvard University.

160. The attachment at Tab F is correspondence from William Shinn of the law firm of Shook, Hardy & Bacon, which firm has historically represented the tobacco industry. The date of the letter is June 8, 1978, approximately one year

before the memoranda attached at Tabs D and E. Shinn's letter is written to Henry Meadow, Dean for Planning and Special Projects at the Harvard Medical School. In his letter, Shinn writes: The companies' obligation to continue funding under the project is contingent under Harvard's performance under the contract and no obligation should be inferred subsequent to the time that the facility became inadequate for the needs of the project. I am not, however, recommending a legalistic approach to the problem with which we are confronted. I do want to be candid in stating my opinion that the companies have no contractual responsibility to continue funding the project.

161. It is uncontested that the tobacco industry terminated its funding of the Harvard Research Program directed by Dr. Huber at a time when, by his deposition testimony, he was making significant progress on research relating to smoking and health. The correspondence from William Shinn, Tab F and the contemporaneous memoranda from Huber, Tabs D and E, support the inference that Harvard was hostile to the tobacco industry.

162. It is not possible to ignore Huber's deposition statement that in approximately 1980, he met with tobacco industry lawyers in a hotel in Boston who told him that his research was "getting too close to some things." Huber identified these attorneys as counsel from the Shook, Hardy firm, representing the industry, and from Defendants Lorillard and Brown & Williamson. (Huber Dep. At 46).

163. If Huber's assertion regarding the meeting in Boston is true, it is direct evidence of tobacco industry attorneys attempting to manipulate the direction or outcome of research relating to smoking and health.

164. By correspondence dated January 21, 1998, CLAD 2102(c), Defendants argued that the Texas deposition of Dr. Huber was in effect an "ambush" because Huber had for a period of years been a paid consultant to the tobacco

industry, and that they were unaware that he had been in communication prior to his deposition with counsel for Plaintiffs.

165. In support of this argument, Defendants submitted the Affidavit of Thomas F. Gardner, attorney at law, CLAD 2102(b), dated January 21, 1998. Gardner is a member of the law firm of Jones, Day, Reavis & Pogue, and has been a lawyer since 1969. In his Affidavit, Gardner asserts that Huber had been a confidential consultant with the tobacco industry even while at Harvard University. Gardner Depo. ¶ 5. Assuming Gardner's statement is true, Dr. Huber was considered a paid consultant to the tobacco industry at the same time he was directing the research project at Harvard University~. (This fact would belie the assertion that the Harvard research was independent.) Huber left Harvard after the tobacco industry discontinued funding his research project there and went to the University of Kentucky. Huber Depo. p. 44.

166. The Gardner Affidavit also suggests that Dr. Huber's recent hostility to the tobacco industry may be the result of a financial investigation conducted by Texas officials. Gardner Affidavit ¶8. In any event, it is obvious that Gardner considers Huber to be a "turned" witness.

167. I do not conclude that Huber's deposition testimony is objectively "true." I do conclude, however, that it crosses the threshold of probable cause for crime fraud purposes, and I am unable to conclude that the evidence has been rebutted by Defendants.

168. The Defendants collectively have directed my attention to substantial amounts of research, conducted in house and by third parties, which research, they argue, blunts or negates the findings above. Phillip Morris, for example, as part of its filings prior to these hearings, delivered as Exhibit 1 consisting of 88 volumes, each of which contains roughly 300 pages, each page of which is a

log entry representing in-house or sponsored research.

169. With respect to the research done by Defendants, Plaintiffs urge that I conclude that it focused "on product design and development, rather than smoking and health (or biological research)." See Plaintiffs Proposed Finding 74.

170. It is not within my ability to evaluate the research to which the Defendants have directed my attention. I am persuaded that Plaintiffs have established to a degree of probability that Defendants collectively agreed not to conduct, or to eliminate or reduce, scientific research which related to issues of smoking and health. This evidence has not been rebutted.

171. Pursuant to the Fifth Order Establishing Procedures, plaintiffs were permitted to introduce additional evidence of crime-fraud. See Fifth Order, at ¶ 4. As a result, plaintiffs made lengthy written submissions and presented argument regarding defendants' public denials of addiction, defendants' internal knowledge regarding the addictive nature of nicotine and defendants' intentional manipulation of nicotine.

172. Defendants argue that this evidence was not properly before the Special Master during these proceedings and that the plaintiffs should submit this evidence for a ruling before Judge Fitzpatrick on crime-fraud.

173. I conclude that, pursuant to the Fifth Order, defendants had adequate notice that plaintiffs would present additional crime-fraud evidence and had an adequate opportunity to respond to such allegations. Moreover, I find that the issues of addiction and nicotine manipulation are encompassed within Judge Fitzpatrick's crime-fraud finding of May 9. Specifically, I find that such evidence is closely related to Judge Fitzpatrick's findings regarding defendants' assurances that they "would not knowingly distribute a dangerous product" and promises "to solidify such an

assurance. ..."; defendants' assurance" that the tobacco industry was committed to providing safe products," and defendants' use of attorneys and/or claims of privilege to suppress information and documents "which appear to be scientific in nature and specifically related to health issues." See order of May 9, pp. 5,9. In addition, contrary to defendants' contention, Judge Fitzpatrick referred to his order of May 9 to an internal document concerning the addictive effects of nicotine. See Order of May 9 p. 7 (citing BATCo 1005003495).

174. Based upon a review of the evidence and presentations by plaintiffs and defendants on the issues of nicotine manipulation and addiction, I make the following findings of fact:

175. Plaintiffs have presented evidence that defendants, in their public statements, have repeatedly denied that cigarettes and/or nicotine are addictive and minimized the difficulties of quitting smoking. For example, in a 1988 press release, the Tobacco Institute stated:

Claims that cigarettes are addictive contradict common sense. . . . The claim that cigarette smoking causes physical dependence is simply an unproven attempt to find some way to differentiate smoking from other behaviors.... The claims that smokers are addicts defy common sense and contradict the fact that people quit smoking every day.

Plaintiffs' Ex. 21(1), TI 0019963, p. 963.

176. In another 1988 press release, the Tobacco Institute stated that the Surgeon General's declaration that smoking is an addiction was: "[A In escalation of antismoking rhetoric. ... without medical or scientific foundation." Plaintiffs' Ex. 22(1), TI 00125189, p. 189.

177. In a 1989 interview on ABC's Good Morning America, the Tobacco Institute spokesperson stated: "I can't

allow the claim that smoking is addictive to go unchallenged...." Plaintiffs' Ex. 23(1), TI 339671, p. 673.

178. In a 1990 interview on CNN Larry King live, the Tobacco Institute spokesperson stated: [About 95 percent of those people have quit cold turkey. They've walked away from cigarettes and they've not gone through formal treatment centers or anything else. It's not like alcoholism or drug abuse. It's not an addiction. Plaintiffs' Ex. 24(1), TI 00341405, p. 420 (emphasis added).

179. In a 1992 pamphlet, Philip Morris stated: "Those who term smoking an addiction do so for ideological -- not scientific --reasons." Plaintiffs' Ex. 25(1), PM 2023916742, p. 745.

180. In a 1994 published statement, Philip Morris stated: "Philip Morris does not believe cigarette smoking is addictive." Plaintiffs' Ex. 26(1), PM 2023011263, p. 263.

181. Finally, in congressional testimony in 1994, the chief executive officers of the tobacco companies each testified under oath that cigarettes are not addictive:

- C William Campbell, Philip Morris: "I believe that nicotine is not addictive, yes.
- C James Johnston, Reynolds: "Mr. Congressman, cigarettes and nicotine clearly do not meet the classic definition of addiction."
- C Andrew Tisch, Lorillard: "I believe that nicotine is not addictive."
- C Ed Horrigan, Liggett: "I believe that nicotine is not addictive."
- C Thomas Sandefur, B&W: "I believe that nicotine is not addictive."

C Donald Johnston, American: And I, too, believe that nicotine is not addictive."

Plaintiffs' Ex. 27(1).

182. Defendants' public statements regarding addiction are now contradicted by most of the scientific community. For instance, in 1988, the Surgeon General concluded that:

1. Cigarettes and other forms of tobacco are addicting.
2. Nicotine is the drug in tobacco that causes addiction.
3. The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.

Plaintiffs' Ex. 28(1), The Health Consequences of Smoking: Nicotine Addiction, A Report of the Surgeon General, 1988, p. 9. The U.S. Food & Drug Administration (Plaintiffs' Ex. 20(1)), the American Psychiatric Association (Plaintiffs' Ex.29( 1)), the World Health Organization (Plaintiffs' Ex. 30(1)) and the American Medical Association (Plaintiffs' Ex. 3 1(1)) also have concluded that nicotine causes addiction and/or dependence. (According, to the 1988 Surgeon General's Report, p. 28, the terms "addiction" and "dependence~~ are "scientifically equivalent.").

183. In their proposed Findings 97 and 98, Defendants ask that I find as follows:

97. Documents cited by Plaintiffs (Plaintiff Memorandum at 41-42) indicate Defendants' awareness of the well known fact that nicotine has measurable pharmacological effects on the central, peripheral, and sensory nervous systems and can be, for some smokers, a difficult habit to break.

98. No documents cited by the Plaintiffs indicate that Defendants knew or believed that nicotine met the objective criteria of addiction. Defendants' awareness has not been kept secret as researchers in the scientific community have investigated and published extensively on both the nature and sites of nicotine's pharmacological effects on the central nervous system, the cardiovascular system, and other aspects of human and animal physiology. See. e.g.. J.B. Exhs. 2, 7, 8, 34, 53, 107, 120.

I understand the distinction urged by Defendants:" addiction" has a specific scientific meaning, and a logically defensible argument can be made that cigarette smoking is not encompassed by that meaning.

184. A similar discussion occurred during the Liggett hearings as part of the discussion of "causation" of illness. See my report, September 10, 1997, Findings 121 through 128. Defendants concede that there is a statistical association between smoking and serious illness, but they insist that the final "causal" link is unestablished.

185. What the Defendants have conceded is nevertheless remarkable: nicotine has measurable pharmacological effects on the central, peripheral and sensory nervous systems and can be, for some smokers, a difficult habit to break. The habit in question is strongly associated with several illnesses which can be fatal.

186. In addition to defendants' public denials that cigarettes are addictive, defendants also publicly deny that they intentionally manipulate nicotine in cigarettes. For instance, the Tobacco Institute stated in a 1994 press release:

Cigarette manufacturers do not manipulate' the level of nicotine in various brands Nicotine levels follow tar' levels -- as manufacturers have reduced tar' levels and yields over the years to satisfy changing consumer tastes, nicotine levels

and yields have fallen correspondingly.

Plaintiffs' Ex. 32(1), TI 0328214, p. 214 (emphasis added).

187. In a 1994 advertisement, Philip Morris stated: "Philip Morris does not manipulate' nicotine levels." Plaintiffs' Ex. 26(1), PM 2023011263, p. 263.

188. In a published statement in 1994, the chief executive officer of RIR stated: "[We do not increase the level of nicotine in any of our products to addict' smokers." Plaintiffs' Ex. 33(1),

RJR 513193867, p. 867.

189. In 1994, B&W issued a press release which stated:

... B&W does nothing in the manufacture of its tobacco products that increases the level of nicotine above that which is naturally found in the tobacco plant, nor does it artificially increase nicotine.

Plaintiffs' Ex. 34(1), BAT TND 202337394, p. 394.

190. The 1994 congressional hearings also contained numerous statements by defendants' top officials regarding nicotine manipulation:

- C William Campbell, Philip Morris: "Philip Morris does not manipulate nor independently control the level of nicotine in our products."

- C James Johnston, Reynolds: "We do not add or otherwise manipulate nicotine to addict smokers.... [W]e do not do anything to hook smokers or to keep them hooked."

- C Andrew Tisch, Lorillard: "Lorillard does not take any steps to assure minimum level of nicotine in our

products. Lorillard does not add nicotine to cigarette tobacco for the purpose of manipulating or spiking the amount of nicotine received by the smoker."

- C Donald Johnston, American: "American has no desire or intent to manipulate nicotine."

- C Thomas Sandefur, B&W: "[W]e do not spike our products, nor do we manipulate the nicotine in our cigarettes to keep people hooked as the FDA alleges."

Plaintiffs' Ex. *35(1)*, pp. 542, 558, 593, 595; Ex. 36(1), p. 139.

191. Notwithstanding the above public statements, the tobacco industry has recognized internally that nicotine is an addictive drug and that cigarettes are drug delivery or nicotine delivery devices. For example, a report of discussions with industry research directors in the 1950s as the industry prepared to publish the Frank Statement, recorded among their conclusions "it's fortunate for us that cigarettes are a habit they can't break." Plaintiffs' Ex. 37(1), Hill-Ill 493, p. 494.

192. A 1961 document by Sir Charles Ellis, a top BATCo scientist, stated"... smokers are nicotine addicts." Plaintiffs' Ex. 38(1), BATCo 301083862, p. 863.

193. From the Merrell Williams series of BAT/B&W documents is a 1963 document over which privilege is claimed in this case. In this document, Addison Yeaman, counsel for B&W and later president of CTR, admitted that nicotine is addictive:

[N]icotine is addictive. We [B&W] are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms.

B&W Priv. 689033412.

194. An undated BATCo document, written by S.J. Green, one of the company's top scientists, stated: "Smoking is fairly irrational like other drug dependencies." Plaintiffs' Ex. 39(1), BATCo 110069983, p. 985. In another document, Green referenced "members of the nicotine dependent majority." Plaintiffs' Ex. 40(1), BATCo 110069974, p. 977.

195. A 1969 document by Philip Morris scientist William Dunn (known in the company as "the Nicotine Kid") stated: "I would be more cautious in using the pharmic medical model -- do we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous F.D.A. implications to having such conceptualizations go beyond these walls." Plaintiffs' Ex. 4 1(1), PM 1003289921, p. 921.

196. A 1972 document by Philip Morris' Dunn stated that the majority of conferees at a recent CTR conference "accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking." Plaintiffs' Ex. 42(1), PM 2O241739S9,p. 962. Dunn continued: "The cigarette should be conceived not as a product but as a package. The product is nicotine... Think of the cigarette pack as a storage for a day's supply of nicotine. Think of the cigarettes the dispenser for a dose unit of nicotine "Id p. 963.

197. A 1972 document by Claude Teague, a R.J. Reynolds senior scientist, stated that the tobacco industry may be thought of as being a specialized, highly ritualized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiologic effects." Plaintiffs' Ex. 43(1), RJR 500915683, p. 684.

198. A 1978 B&W document stated "very few consumers are aware of the effects of nicotine, i.e. its addictive nature and that nicotine is a poison." Plaintiffs' Ex.

45(1), B&W 665043966, p. 966 (Confidential).

199. A 1979 document by BATCo research executive L.C.F.B. Blackman considered the hypothesis that "high profits.., associated with the tobacco industry are directly related to the fact that the consumer is dependent upon the product." Plaintiffs' Ex. 46(1), BATCo 109872505, p. 508.

200. A 1980 BATCo document stated that "BAT should learn to look at itself as a drug company rather than as a tobacco company." Plaintiffs' Ex. 47(1), BATCo 109884190, p. 190 (Confidential).

201. An undated BATCo document by scientist C. Greig termed cigarettes a " drug' administration system for public use" with significant advantages, one being that "...nicotine is the lowest dose common' drug available." Plaintiffs' Ex. 48(1), BATCo 100503495, pp. 495-497 (Confidential).

202. A 1980 document by Philip Morris scientist Osdene stated, "the thing we sell most is nicotine." Plaintiffs' Ex. 49(1), PM 1000125871, p. 871.

203. A 1983 document by RIP. scientist Teague stated that "in essence, a cigarette is a system for the delivery of nicotine to the smoker in an attractive, useful form." Plaintiffs' Ex. 50(1), RIP. 511223463, p. 466.

204. A 1991 RJR report stated, "We are basically in the nicotine business." Plaintiffs' Ex. 51(1), RJR 509479574, p. 584 (Confidential).

205. Thus, defendants have been aware of the fact that nicotine is a dependency - creating substance since at least the early 1960's.

206. While nicotine itself is a naturally occurring component of the tobacco plant, the modem cigarette is a

highly engineered and sophisticated product in both manufacture and design. Specifically, the defendants control and manipulate the level and form of nicotine in the commercial product. The tobacco industry has admitted in requests for admissions filed in this litigation that they have the technological capability of removing most of the nicotine from cigarettes during the manufacturing process. Plaintiffs' Ex. 52(1).

207. Despite this technological feasibility, the tobacco industry does not currently sell cigarettes with most nicotine removed. Instead, plaintiffs presented evidence that the tobacco industry intentionally maintains nicotine at certain levels because the defendants have long been aware that there is an optimum dose of nicotine needed for its pharmacological and addictive qualities to have their intended effect:

208. As early as 1959, BATCo noted the need to find the "optimum offer" of nicotine to consumers. Plaintiffs' Ex. 53(1), BATCo 100099115. The company recognized that to lower nicotine too much "might end in destroying the nicotine habit in a large number of consumers and prevent it ever being acquired by new smokers." Id.

209. A 1961 document by Sir Charles of BATCo noted the increased use of tranquilizers and "pep pills" as potentially "very serious competitors to smoking," and stated: "If the competition is to be met successfully it must be important to know how the tranquilizing and stimulating effects of nicotine are produced, and the relation of addiction to the daily nicotine intake." Plaintiffs' Ex.

54(1), BATCo 301083862, p. 863.

210. A 1961 Philip Morris document by Helmut Wakeham, a senior scientist, stated: "Even though nicotine is believed essential to cigarette acceptability, a reduction in level may be desirable for medical reasons. ... How much

nicotine reduction will be acceptable to the smoker?" Plaintiffs' Ex. 55(1), PM 1000277423, p. 441.

211. A 1963 letter from B&W to BATCo discussed "optimum levels" for nicotine and correlated the nicotine level in cigarettes with consumer acceptance. Plaintiffs' Ex. *56(1)*, BATCo 102630333, p. 336. The letter stated, "Certainly, the nicotine level of B&W cigarettes.., was not obtained by accident" and that "even now.., we can regulate, fairly precisely, the nicotine and sugar levels to almost any desired level management might require." Id.

212. A 1964 Philip Morris research document stated that "nicotine delivery level should be 0.7mg minimum." Plaintiffs' Ex. 57(1), PM 1001896774, p. 774.

213. A 1971 Reynolds document referred to the "habituating level of nicotine" and asked "how low can we go?" Plaintiffs' Ex. 58(1), RIR 504210018, p. 018 (emphasis added).

214. That same year, Reynolds' scientist Teague wrote: "If, as proposed above, nicotine is the sine qua non of smoking, and if we meekly accept the allegations of our critics and move toward reduction or elimination of nicotine from our products, then we shall eventually liquidate our business. If we intend to remain in business and our business is the manufacture and sale of dosage forms of nicotine, then at some point we must make a stand." Plaintiffs' Ex. 43(1), RIP. 500915683, p. 688.

215. A 1972 BATCo document recognized that if a cigarette's nicotine level ..... is so low that the nicotine is below the threshold of pharmacological activity then it is possible that the smoking habit would be rejected by a large number of smokers."
Plaintiffs' Ex. 59(1), B&W 660913609, p. 620 (Confidential).

216. In 1973, Reynolds' Teague wrote: "Nicotine

should be delivered at about 1.0-1.3 mg/cigarette, the minimum for confirmed smokers." Plaintiffs' Ex. 60(1), RIP. 502987357, p. 361.

217. A scientific report from Philip Morris in 1975 stated, "Apparently there is an optimal dose of nicotine; too little or too much is rejected by tobacco smokers." Plaintiffs' Ex. 61(1), PM 1003294245, p. 246.

218. In 1976, BATCo senior scientist Green wrote: "Taking a long-term view, there is a danger in the current trend of lower and lower cigarette delivers - i.e. the smoker will be weaned away from the habit. . . . Nicotine is an important aspect of satisfaction', and if the nicotine delivery is reduced below a threshold satisfaction' level, then surely smokers will questionmore readily why they are indulging in an expensive habit." Plaintiffs' Ex. 40(1), BATCo 110069974, p. 975.

219. An undated BATCo document stated: "High on the list of product requirements is an adequate level of nicotine to sustain the smoking habit. Smokers have a nicotine threshold below which it is ineffective." Plaintiffs' Ex. 62(1), BATCo 102690336, p. 342.

220. Another undated BAT documents stated: "It is therefore realistic to assume that a product targeted at .8 mg will satisfy the consumers pharmacological requirements for nicotine." Plaintiffs' Ex. 63(1), BATCo 400452855, p. 856.

221. A monthly status report from a Reynolds scientist in 1978 noted that for Winston filters there is "an optimum nicotine strength' rating in an area near pH 6.2-6.3 and 0.12-0.13 mg/puff nicotine." Plaintiffs' Ex. 64(1), RJR 504462513, p. 513.

222. A 1979 report from the same Reynolds scientist noted, for Winston King Size:

"Maximum satisfaction indicated at 1.0 mg/cig nicotine." Plaintiffs' Ex. 65(1), RJR 503851759, p. 759.

223. A 1980 report from Reynolds scientist Rodgman stated: "Further analysis of data from fuller-flavor low tar consumer satisfaction study has revealed both an optimum and minimum nicotine level required to maximum smoking satisfaction. Camel Lights is in the optimum range. Merit 85 is just above the minimum." Plaintiffs' Ex. 66(1), RIR 500250599, p. 599.

224. A 1980 Reynolds competitive brand analysis, which included analysis of the Twin Cities market, found that, "In its full-flavor brands, the nicotine level [in Philip Morris products was close to 1.0 mg/cig., which approximates the optimum nicotine level in that tar' range as indicated by recent Research studies." Plaintiffs' Ex. 67(1), RIP. 504675253, p. 257.

225. A 1980 Lorillard memorandum, to the highest levels of the company, set a research goal, as follows: "Determine the minimum level of nicotine that will allow continued smoking. We hypothesize that below some very low nicotine level, diminished physiological satisfaction cannot be compensated for by psychological satisfaction. At this point smokers will quit, or return to higher T&N brands." Plaintiffs' Ex. 68(1), LOP. 01394380, p. 380 (Confidential).

226. A 1984 agenda for a BAT Group (including B&W) "nicotine conference," listed the first session of the conference as "nicotine dose requirements" and the second session as "nicotine dose estimation."
Plaintiffs' Ex. 69(1), B&W 512106427, p. 428 (Confidential). Other sessions included "effects of nicotine - interaction with the brain ( pharmacology')" and "product modification for maximal nicotine effects." Id., p. 435.

227. A 1987 note from a Philip Morris research

scientist noted "a minimum amount of nicotine is needed for the smoker's satisfaction (0.8 mg/cig)...." Plaintiffs' Ex. 70(1), PM 2023186690, p. 690 (Confidential).

228. A 1989 Reynolds document noted that the company had a "nicotine optimization" program, from 1978 to 1984. Plaintiffs' Ex. 7 1(1), RIP. 507028876, p. 876.

229. In a 1990 document, three Philip Morris scientists stated that "we have shown that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses." Plaintiffs' Ex. 72(1), PM 2028813366, p. 366 (Confidential).

230. Plaintiffs presented evidence that the tobacco industry has for decades secretly searched for method to manipulate nicotine. Some of the methods researched by the tobacco industry included the direct addition of nicotine.

231. As early as 1956, Reynolds experimented by adding nicotine to tobacco stem. Plaintiffs' Ex. 73(1), RiP. 501052852, p. 852.

232. In 1960, Philip Morris was studying the effect of adding nicotine -- in the form of nicotine maleate -- to blended leaf tobacco to increase the nicotine content of cigarettes. Plaintiffs' Ex. 74(1), PM 1001919941, p 941.

233. In 1963, American Tobacco experimented by adding commercial nicotine to its reconstituted tobacco. Plaintiffs' Ex. 75(1), AM 00316688, p. 688 (Confidential).

234. In 1964 Philip Morris was "investigating purchasing nicotine." Plaintiffs' Ex. 76(1), PM 1001896774, p. 774.

235. In 1967, American Tobacco investigated the production of nicotine from "n rustica," a plant with almost double the concentration of nicotine. Plaintiffs' Ex. 77(1), AM

00881318, p. 318 (Confidential).

236. In 1969, American Tobacco began to refer to nicotine in its experimental work as "Compound W," apparently out of concerns for secrecy. Plaintiffs' Ex. 78(1), AM 00533224, p. 224 (Confidential).

237. In 1973, Lorillard investigated trapping and collecting nicotine from the exhaust gases of its drying operations and calculated the total pounds needed for production cigarettes. Plaintiffs' Ex. 79(1), LOR 81082148, p. 148 (Confidential).

238. However, the tobacco industry learned that the direct addition of nicotine was not a desirable route. Among other reasons, the industry learned that cigarettes with added nicotine had "poor taste." Plaintiffs' Ex. 80(1), BATCo 402390265, pp. 279-80. The addition, nicotine's hazardous nature made experimentation and manufacture with nicotine extremely difficult. Plaintiffs' Ex. 80(1), BATCo 402390265, p. 280. One BATCo document noted that the addition of nicotine solutions to tobacco sheet led to the evacuation of a plant at LeMans. Plaintiffs' Ex. 81(1), BATCo 110088143, p. 151. Significantly, nicotine also was suspected of being a co-carcinogen. Id

239. Accordingly, the tobacco industry researched more sophisticated methods of manipulating the addictive potential of cigarettes. In 1977, BATCo scientists discussed the drug etorphine, noting that it "is 10,000 times as effective an analgesic as morphine and has addictive characteristics." Plaintiffs' Ex. 82(1), BATCo 107467542, p. 542 (Confidential). BATCo further noted that "[p]erhaps a regular dose of 0.2 ug/day would generate an addictive craving for the source. If so, 6 ug in, say 30 cigarettes would provide such a dose. . . . Do you think the possibility that competitors might use such a route to create brand allegiance for low delivery cigarettes ought to be discussed at the Research Managers Conference?" Id.

240. The tobacco companies extensively researched nicotine analogues, compounds similar to nicotine which might produce the same effects. Plaintiffs' Ex. 83(1), BATCo 105494689, p. 689; Plaintiffs' Ex. 84(1), LOR 00110371, p. 371 (Confidential). By 1988, Reynolds was studying hundreds of analognes for their pharmacological effects, including their effect on the same receptors in the brain which are affected by nicotine. Plaintiffs' Ex. 85(1), RIP. 514894567, p. 583 (Confidential).

241. The tobacco companies also investigated stereoisomers of nicotine -- which have the same chemical formula as nicotine, with the molecules arranged in a different fashion -- for their pharmacological activity. Plaintiffs' Ex. 86(1), BATCo 101117452, p. 452; Plaintiffs' Ex. 87(1), RJR 508880478, p. 478; Plaintiffs' Ex. 88(1), PM 2025986606, p. 606 (Confidential).

242. In the 1980s, Philip Morris studied the compound acetaldehyde. In 1982, a Philip Morris scientist wrote that "acetaldehyde readily penetrates the blood-brain barrier...." Plaintiffs' Ex. 89(1), PM 1003198459, p. 461. In 1983, Philip Morris determined that acetaldehyde could enhance the positive reinforcing effect of nicotine, and Philip Morris set as a goal finding the ratio of acetaldehyde to nicotine that would have "optimal reinforcing effects." Plaintiffs' Ex. 90(1), PM lOOO4l388l,p. 889. Philip Morris scientists even charted the effect of the presence of acetaldehyde upon sales. Plaintiffs' Ex. 91(1), PM 2022261214 (Confidential).The U.S. tobacco industrv used acetaldehvde in commercial cigarettes Plaintiffs' Ex. 92(1), LOR 89257690, p. 690 (Confidential/Category 1).

243. Reynolds found, by 1988, that levulinic acid "can enhance the binding of nicotine to nicotinic receptors in rat brain membrane preparations (unpublished observations). This appears to be a pharmacologically specific effect since it occurred at very low concentrations of levulinate." Plaintiffs'

Ex. 85(1), RIR 514894567, p. 567.Plaintiffs'also presented evidence that the U.S. tobacco industrv used levulinic acid in commercial cigarettes Plaintiffs' Ex. 93(1), B&W 606000841, p. 867.

244. In the 1980's, the BAT Group and B&W developed "Y-l," a "genetically engineered tobacco" at an experimental farm in North Carolina and used seeds from the strain to grow artificially high nicotine tobacco in Brazil. Plaintiffs' Ex. 94(1), B&W5 10003880, p. 880 (Confidential). The nicotine content of Y- 1 tobacco was approximately twice the nicotine content of conventional tobacco. Plaintiffs' Ex. 95(1), B&W 661071395A, p. 395A (Confidential)This nicotine-enhanced tobacco was used to alter tar/nicotine ratios in commercial cigarettes sold in the United States Id.

245. One process for secretly manipulating nicotine has become the standard in the tobacco industry for cigarettes marketed throughout the United States, including Minnesota. This involves manipulating the form of nicotine in cigarettes by controlling the pH of cigarette smoke through the use of ammonia compounds.

246. Plaintiffs presented evidence that the introduction of ammonia or ammonia compounds into the cigarette manufacturing process raises the pH of tobacco. See Plaintiffs' Ex. 50(1), P.IP. 511223463, pp. 466, 468; Plaintiffs' Ex. 96(1), RJP. 500606138, p. 141 (Confidential).

247. As the pH rises, the tobacco smoke becomes more "basic" and results in an increase in the amount of "free" nicotine, also known as "free base" nicotine (as opposed to "bound" nicotine). See Plaintiffs' Ex. 50(1), RIP. 511223463, p. 466plaintiffs' Ex. 97(1), LOP. 00776238, p. 239 (Confidential).

248. Free nicotine is more volatile and physiologically active than bound nicotine. As one Reynolds document explained:

In essence, a cigarette is a system for delivery of nicotine to the smoker in attractive, useful form. At "normal" smoke pH, at or below about 6.0, essentially all of the smoke nicotine is chemically combined with acidic substances, hence is non-volatile and relatively slowly absorbed by the smoker. As the smoke pH increases above about 6.0, an increasing proportion of the total smoke nicotine occurs in "free" form, which is volatile, rapidly absorbed by the smoker, and believed to be instantly perceived as nicotine "kick." Plaintiffs' Ex. 50(1), RIP. 511223463, p. 466.

249. BAT scientists also understood that "free base nicotine is the most chemically and physiologically active form because it is most rapidly absorbed." Plaintiffs' Ex. 98(1), BATCo 500104402, p. 408.

250. Plaintiffs presented evidence that Philip Morris was the first tobacco manufacturer to use the ammonia process in the United States, beginning in 1964 or 1965, on the heels of the first Surgeon General's report. Plaintiffs' Ex. 99(1), RIR 500990999, p. 1002 (Confidential). At the time, Philip Morris ranked far behind Reynolds in domestic cigarette sales. Plaintiffs' Ex. 100(1) (Confidential/Category 1).

251. Simultaneously with the use of ammonia in its cigarettes, sales of Philip Morris products began to rise dramatically. Id.

252. In 1973, Reynolds conducted an extensive study of the design of Philip Morris Marlboro cigarettes in attempt to discover the reason for its competitor's sharp increase in sales. A "secret" Reynolds report disclosed that:

C Reynolds undertook "an intensive study of the physical and chemical properties" of competitive brands which were showing "vigorous sales growth." Plaintiffs' Ex. 50(1), RIR 511223463, p. 465.

C Reynolds discovered that the pH of Marlboro was consistently and significantly higher than Reynolds' brands and, accordingly, Marlboro contained more free nicotine and "would be expected to show more instantaneous nicotine kick' than our brands." Id. The amount of free nicotine in Marlboro was almost three times that found in the smoke of Reynolds' Winston brand. Id., p. 466.

C Reynolds also concluded that other well selling brands -- for example B&W's Kool --also had increased smoke pH and increased amounts of "free nicotine." Id.

C Reynolds concluded that the high smoke pH attained by Philip Morris and B&W was "deliberate and controlled." j~, p. 465.

C Reynolds also found, using mathematical regression models, that the amount of free nicotine in a particular brand correlated positively to that brand's market share Id p. 490.

253. While Reynolds and the rest of the tobacco industry soon learned the reasons behind the success of Marlboro, the public -- and smokers -- were not informed. For example, a senior Philip Morris executive was interviewed in 1973 by Mike Wallace on "60 Minutes," as follows:

WALLACE: [W]hy is Philip Morris apparently doing so much better than the industry as a whole?

PHILIP MORRIS: I wish I knew the answer to that.... It is difficult explain why. Plaintiffs' Ex. 101(1), RIP. 503665743, p. 744.

254. Reynolds soon moved its cigarette design in the same direction as Philip Morris. In 1973, Reynolds discussed

using pH manipulation "to assure P.JP. a larger segment of the youth market." Plaintiffs' Ex. 102(1), RJR. 501166152, p. 152.

255. By 1974, Reynolds had "introduced ammoniated sheet filler in the Camel filter cigarette... . Better market performance was indicated in the subsequent years." Plaintiffs' Ex. 103(1), RIR 509018864, p. 864 (Confidential).

256. Eventually, the use of ammonia -- resulting in increased levels of pH and "free nicotine" -- was the norm of the industry. As B&W reported in a 1989 document, "all U.S. manufacturers except Liggett use some form of AT [ammonia technology] in some cigarettes products...." Plaintiffs' Ex. 104(1), B&W 508104012, p. 016 (Confidential). Liggett then also began to use ammonia technology. Plaintiffs' Ex. 105(1), LG 2018563, p. 563 (Confidential/Category 1).

257. Ammonia compounds became the top additives by volume in the industry. Plaintiffs' Ex. 106(1), B&W 566408585, p. 585 (Confidential).

258. As another B&W document stated: "RIP. alone has ammonia emissions of 900,000 lbs./year in North Carolina," "the U.S. industry uses about ten million pounds of ammonia compounds a year," and industry ammonia usage "corresponds to about 10 mg. of ammonia compounds per cigarette produced." Plaintiffs' Ex. 104(1), B&W 508104012, p. 016 (Confidential).

259. Plaintiffs presented evidence of lawyer involvement in nicotine addiction and manipulation issues. The tobacco industry recognized that the issues of nicotine addiction were potentially explosive in smoking and health litigation. As a 1980 Tobacco Institute document stated:

Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting

attorney can have in a lung cancer/cigarette case. We cant defend continued smoking as "free choice" if a person was "addicted."

Plaintiffs' Ex. 107(1), TI 0107822, p. 823 (Confidential).

260. At a 1983 meeting of research directors, BAT and Philip Morris (and several foreign tobacco companies) noted "possible legal implications" of certain research. Plaintiffs' Ex. 108(1), BATCo 109840698, p. 698 (Confidential). A document memorializing the meeting stated:

"[T]he role of nicotine, at the relevant lower range of nicotine dosage, in perpetuating the smoking habit [was] a particularly sensitive area for the industry. ... If any study showed that nicotine was, or was not, associated with perpetuating the smoking habit, industry could well be called upon to reduce or eliminate nicotine from the product. (A heads we lose, tails we cannot win situation!).

Id., p. 700 (Confidential).

261. Edwin Jacob, long-time tobacco industry counsel, "advised a total embargo on all

work associated with the pharmacology of nicotine" in a meeting with the European tobacco industry. Plaintiffs' Ex. 109(1), BATCo 110083647, p. 649. Jacob's advice was based in part on: "The pending Californian lawsuit which indicted nicotine as an addictive substance "Id p. 650.

262. In the present proceedings, there are a large number of documents relating to addiction and nicotine manipulation for which the tobacco companies are asserting privilege. For example, Philip Morris's scientist William Dunn, appears on the Philip Morris logs. One such privileged document is from Dunn to Robert Seligman, vice president for research and development, and is logged as, "Memorandum from Philip Morris employee to Philip

Morris employee containing legal advice regarding nicotine research" PM 2022249518.

263. Other documents authored by Dunn and withheld by Philip Morris include:

C "Memorandum from Philip Morris employee to Philip Morris counsel ... regarding neuroscience research." PM 1003289971. See also PM 1003724292 (ibid.).

C "Memorandum ... memorializing conversations with D. Hoel and E. Jacobs regarding nicotine research program." PM 2046754714.

C "Report from Philip Morris employee to Philip Morris counsel ... regarding neurosciences and research." PM 2046754716.

264. The Philip Morris privilege logs also list a series of documents authored by senior scientist Helmut Wakeham, who was head of research and development, relating to nicotine. For example:

C A 1963 document from Wakeham to another Philip Morris scientist is listed as, "memorandum ... memorializing conversation with Philip Morris counsel regarding nicotine research." PM 1001936577.

C A 1968 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel ... regarding nicotine manuscript." PM 1000322221.

C A 1971 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel regarding smoking behavior." PM 1005108606.

- C A 1973 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel ... regarding tar and nicotine deliveries" PM 1000218906.

- C A 1975 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel regarding smoking and human behavior." PM 1000209435.

- C A 1977 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel regarding smoking behavior." PM 1000212791.

- C A 1976 document from Wakeham is listed as "memorandum from Philip Morris employee to Philip Morris counsel ... seeking advice regarding tar and nicotine intake." PM 1000215306.

265. Other Philip Morris privilege log entries relating to nicotine and addiction include:

- C "Memorandum from Philip Morris employee to Philip Morris counsel regarding nicotine content." PM 1005068816.

- C "Memorandum from Philip Morris employee to Philip Morris counsel ... regarding research on physiological effects of tobacco." PM 1000245054.

- C "Memorandum from Philip Morris employee to Philip Morris counsel regarding nicotine research." PM 1003717684.

- C "Memorandum from Philip Morris employee to Philip Morris counsel ... regarding research on nicotine delivery." PM 2023095464.

C "Memorandum ... prepared at the direction of Philip Morris counsel regarding nicotine." PM 2050878696.

C "Letter.. sent at the direction of Philip Morris counsel regarding pharmacology of nicotine." PM 2029266161.

C "Memorandum sent at the direction of counsel ... regarding the pharmacology of nicotine. PM 2029266156. See also PM 2029266155 (ibid.)

C "Report analyzing claims regarding nicotineprepared by Philip Morris consultant and sent to Philip Morris counsel...." PM 2023196038.

266. Plaintiffs presented evidence of other defendants' claims of privilege over documents relating to addiction. Examples from the privilege logs include:

C B&W is withholding a document addressed to "members of the addiction committee" and titled "confidential communication from outside counsel for B&W to an industry committee . . . providing information to facilitate the rendition of leual advice regarding smoking cessation" B&W 682012003.

C Reynolds is withholding a 1957 document authored by scientist Rodgman titled, according to the 4A index, "Cigarette Smoking Termed Lethal Habit With Some Addiction Involved." RIR 503270819.

C Reynolds is withholding a 1983 document from one scientist, R.H. Steele, to another scientist, C.W. Nystrom, entitled, according to the 4A index, "EEG Power Spectral Effects of Intravenous Nicotine Administration in Humans." RIP. 502526580. (EEG, also known as electroencephalography, measures brain activity.)

C BATCo is withholding a 1975 document from senior

scientists S.J. Green and D.G. Felton described on the privilege logs as "request for legal advicere smoking habit experiments." BATCO 100430150.

- C BATCo is withholding another document to Green and Felton, as well as senior executive I.W. Hughes, dated 1961 and titled "advicere comparison of methods for nicotine assay." BATCO 105397865.

267. Plaintiffs also presented evidence that a number of defendants are withholding documents directly related to nicotine manipulation -- including documents relating to ammonia (or ammonia compounds, such as diammonium phosphate) and acetaldehyde and nicotine levulinate. For example:

- C Philip Morris is withholding a series of documents relating to an Immonia white paper." See PM 2050872144;PM 2050872011; PM 2050872012; PM 2050871955; PM 2050871956; PM 2050872038; PM 2050872055.

- C Philip Morris is withholding a series of charts and graphs Regarding ammonia and nicotine." See PM 2051994843; PM 2050871668; PM 2050871699; PM 2050871701; PM 2050871721; PM 2050871725; PM 2050871760; PM 2050871792; PM 2050871795.

- C Philip Morris is withholding a "memorandum from Philip Morris employee to Philip Morris counsel ... regarding casing andacetaldehvde delivery." PM 2050802978.

- C B&W is withholding a letter prepared by in-house counsel "regarding consumer awareness of the effect of ammonia on nicotine." B&W 690850007.

- C B&W is withholding a report by its in-house counsel Wells ~relating to ammonia use in cigarettes...."

B&W 536470451.

C Reynolds is withholding a "list" and a "report" by scientist Colby and outside consultant Frederick Giller entitled, according to the 4A index, Acetaldehyde." RIP. 500270284; RIP. 500549524.

C Reynolds is withholding documents, as described in the 4A index, on "use of diammonium phosphate", see RIR 510603906; P.JR 507866200; ammonia in cigarette smoke" see RIP. 502857019; RIR 503260109; RIP. 504834095; "use of reconstituted tobaccos containing ammonia," RIR 506209147; ammonia," RJR 504212337.

C Reynolds is withholding a series of documents, as described in the 4A index, on levulinic acid and nicotine levulinate. See RJR 506235259 ( ~cientific affairs evaluation of nicotine levulinate as a cigarette tobacco ingredien1~) RJR 507955418 ("levulinic acid.., has the structure CH3CO(CH2~2COOI{).

268. In response to the evidence of defendants' internal knowledge that nicotine is an addictive drug, defendants argue that plaintiffs have "cherry picked" from defendants' documents. Transcript, p. 143. 1 conclude, however, that this response does not adequately account for the more than 80 documents, spanning more than 40 years, presented by plaintiffs. I also note that defendants have not disputed the content of these documents. It is also noteworthy that these documents were written primarily by senior scientists and research officials at defendant companies. Finally, defendants have failed to present evidence from their own internal files to support their allegation that plaintiffs' selection is unrepresentative of defendants' actual knowledge regarding addiction.

269. In fact, the evidence from defendants' internal files indicates that there has been no serious debate for years

that smoking is addictive, or habituating. For example, a 1975 BAT document by A. Corner, a BATCo scientist, concluded that: "In summary, it appears that most workers who are not directly concerned with the tobacco industry use the terms addiction or dependence rather than habituation and can be considered quite correct in doing so. If cigarette smoking is as addictive as the evidence suggests, it is not surprising that antismoking campaigns are so ineffective " Plaintiffs' Ex. 44(1), BATCo 105392361, p. 366 (emphasis added).

270. In addition to these internal company documents, defendants' own experts contradict defendants' position on addiction. For example, defendants' experts in this litigation, Dr. Peter M. Rowell and Dr. Zalman Amit, have conceded that smoking is addicting and/or a drug of dependence at one time or another. In his deposition, Dr. Rowell admitted that nicotine in cigarettes is dependence producing and that the terms "addiction" and "dependence" are used synonymously. Plaintiffs'Ex. 2(2), Rowell Depo., pp. 134-135. (Dr. Rowell stated that in his view, however, nicotine caused only mild dependence and that only severe dependence was an addiction.). Dr. Amit had no difficulty comparing cigarette smoking to other drugs widely acknowledged to be addictive in his earlier writings. In a book he wrote in 1976 entitled 'Stop Smoking for Good", Dr. Amit admitted that nicotine is similar in its actions to cocaine and the amphetamines. Plaintiffs' Ex. 3(2), p. 6; Ex. 4(2), Amit Depo., p. 102. Dr. Amit also wrote that "[stopping smoking, all the research indicates, is quite as difficult as giving up alcohol or even heroin. Plaintiffs' Ex. 3(2), p. 207; Ex. 4(2), Amit Depo., p. 138. At his recent deposition, Dr. Amit agreed that both cocaine and cigarette smoking are "dependence-producing." Plaintiffs' Ex. 4(2), Amit Depo., pp. 107-108, 110.

271. In response to plaintiffs' evidence of nicotine manipulation, defendants argue that they have conducted research and manufactured and sold cigarettes with reduced tar and nicotine levels as measured by the FTC. However,

this ignores the substantial evidence presented by plaintiffs regarding compensation for reduced levels of nicotine. In addition, there is evidence of nicotine manipulation in low tar cigarettes manufactured by defendants, which would lead to a cigarette with higher addictive potential than indicated by the FTC rating. For example, a Reynolds documents states that "low tar' products at RJR were designed with ammoniated sheet material beginning in 1974." Tab 51, Reynolds 509018864. 272. Defendants also argue that the pH of cigarette smoke has no effect on the overall level of nicotine absorbed by the smoker. Documents from defendants' internal files, however, describe how increasing the pH level has the effect of increasing the amount of "free" or "free base" nicotine, as opposed to "bound" nicotine. Free nicotine, defendants' documents reveal, is absorbed more rapidly by the smoker than bound nicotine. For example, a Reynolds document states that "[a]s the smoke ~H increases above about 6.0. an increasing proportion of the total smoke nicotine occurs in "free" form, which is volatile, rapidly absorbed by the smoker, and believed to be instantly perceived as nicotine kick"' Plaintiffs' Ex. 50(1), RIP. 511223463, p. 466 (emphasis added). A BATCo document states that "free base nicotine" is the "most chemically and physiologically active foruf of nicotine. Plaintiffs' Ex. 98(1), BATCo 5001 04402(emphasis added). According to plaintiffs' expert on addiction, by increasing the amount of free nicotine, the "addictive potential of nicotine is increased. "See Expert Report of Dr. Richard Hurt. Thus, I find that defendants' arguments discounting the impact on the smoker of increasing pH are not persuasive.

273. Defendants, through the affidavit of former Philip Morris employee, John D. Hind, argue that the use of ammonia products in manufacturing reconstituted sheet was not developed in order to affect nicotine delivery. Similarly, Reynolds introduced a 1996 document apparently prepared for "legal and regulatory responses" stating that Reynolds' decades of research on pH manipulation was wrong. I do

not find this evidence persuasive. Numerous contemporaneous documents from the internal files of defendants are more persuasive evidence than isolated documents created by defendants for litigation purposes. In addition, Mr. Hinds' affidavit does not address whether his invention was ever used by Philip Morris for the purpose of increasing pH and the amount of free nicotine in cigarette smoke. Similarly, the 1996 Reynolds document is directly contradicted by previous internal memoranda from Reynolds' files, which were written prior to nicotine manipulation surfacing as an issue in tobacco litigation. See, ~.g. Plaintiffs' Ex. *50(1),* RJR 511223463, p. 465 (attributing the rise in sales of Marlboro to its higher pH and hence free nicotine).

274. The law provides certain protection against the discovery of communications between an attorney and his/her client:

An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty nor can any employee of the attorney be examined as to the communication or advice, without the client's consent. Minn. Stat. ß 595.02(b).

275. The party asserting the attorney client has the burden of establishing the privilege. Brown v. St. Paul City Ry. Co., 241 Minn. 15, 62 N.W.2d 688, 701 (1954). The elements of the attorney-client privilege are well established: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence *(5)* by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser,(8) except the protection be waived. Brown, 62 N.W.2d at 700.

276. Similarly, protection from disclosure is provided

to work product. Work product is divided into two categories -- opinion work product and ordinary (or fact) work product. Again, the party asserting the privilege has the burden of establishing that protection applies. The protection for ordinary work product is qualified. It is discoverable upon a showing that "the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Minn. P.. Civ. P. 26.02(c). Opinion work product -- the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation --is more fully privileged from disclosure. Brown, 241 Minn. at 35, 62 N.W.2d at 701.

277. Both the attorney-client privilege and the work product doctrine protect communications whose predominate purpose is legal in nature. The attorney-client privilege protects confidential communications between an attorney and a client "where legal advice is sought." Burton v. R.J. Reynolds Tobacco, 170 F.R.D. 481,484 (D. Kan. 1997) (32 of33 tobacco industry documents reviewed found not privileged). The work product doctrine protects only information "primarily concerned with legal assistance." In re Air Crash Disaster at Sioux City Iow% 133 F.R.D. 515, 519 (N.D. Ill. 1990).

278. In Minnesota, privileges are narrowly construed because their assertion results in the "suppression of relevant and essential evidence." Baskerville v. Baskerville 75 N.W.2d 762, 771 (Minn. 1963). Whether the party asserting privilege has satisfied its burden is a question vested in the discretion of the trial court. Erickson v. MacArthur, 414 N.W.2d 406, 407 (Minn. 1987). Likewise, it lies within the court's discretion to determine whether particular information is protected work product, and whether that protection has been overcome. In re Indenture of Trust March 1. 1982 437 N.W.2d 430, 437 (Minn. App.

1989).

279. I find that defendants' claims of privilege are overly-broad. Defendants have asserted privilege over thousands of communications that constitute or concern scientific research. As Judge Fitzpatrick concluded, however, defendants had an independent obligation to conduct research into the safety of their products, and to warn consumers if the research results supported negative conclusions. That obligation to disclose cannot be eliminated by the assertion of attorney-client privilege. Order of May 9, p. 28. Nor does scientific information become privileged merely because it is incorporated into a communication between an attorney and client. Upjohn Co. v. United States, 449 U.S. 383, 395-96, 101 S.Ct. 677, 685-86. Legal departments simply "are not citadels in which public, business or technical information may be placed to defeat discovery. ..." Simon v. G.D. Searle, 816 F.2d 397, 403 (8th Cir. 1987)cert. denied, 484 U.S. 917 (1987). \

280. Nor does defendants' claim that much of the research is public justify their claim of privilege over other research. As Judge Fitzpatrick found, defendants cannot publicly use research which supports their economic interests, but claim privilege for research which may not. Order of May 9, p. 28 (citing Laughlin v. A.H. Robins, Minn. Dist. Ct. No.776-868 (March 21, 1984).

281. I specifically find that defendants have asserted claims of privilege over information generated by counsel acting in scientific, administrative or public relations capacities, but not in a legal capacity. That information is not privileged. See Burton, 170 F.R.D. at 484 (D. Kan. 1997).

282. I find that plaintiffs have demonstrated substantial need for documents concerning scientific research that have been designated by defendants as fact work product, and that plaintiffs are unable to obtain the substantial equivalent of the withheld fact work product

without undue hardship. See Rule 26.02, Minn. R. Civ. P. Defendants in this action contest that smoking causes disease and nicotine is addictive, yet seek to place certain research and/or scientific analysis that may prove otherwise beyond discovery. Thus, plaintiffs have a substantial need for fact work product documents which demonstrate defendants' knowledge and internal views concerning the health hazards of smoking, including nicotine addiction. In similar circumstances, where manufacturers deny knowledge of the health hazards of their products, courts have found that information revealing such knowledge is discoverable. See Laughlin v. A.H. Robins, D.C. File No. 776868 (Minn. Dist. Ct., March 21, 1984) (J. Lebedoff) (plaintiffs established need for work product tests regarding dangers of Dalkon Shield IUD); Loenen v. Johns Manville, 135 F.R.D. 94, 99-100 (D.N.J. 1990) (plaintiffs met showing of need for otherwise privileged information establishing defendants' awareness of dangers of asbestos). See also Judge Fitzpatrick Order of November 1, 1995 (CLAD #278) (finding plaintiffs had made showing of substantial need for production of defendants' fact work product document indices); Judge Fitzpatrick Order of September 4, 1997, p. 3 (CLAD # 1300) (finding plaintiffs had made showing of substantial need for production of defendants' fact work product formula documents).

283. Plaintiffs' showing of substantial need is further strengthened by evidence in the record demonstrating that defendants have selectively employed claims of privilege in order to shield certain information from discovery while certain other information was produced by defendants. In addition, defendants have not clearly articulated how they have drawn the distinction between scientific documents produced to plaintiffs and scientific documents withheld on claims of privilege.

284. One example of defendants' selective use of privilege is the 1996 document introduced by Reynolds in these proceedings on the issue of nicotine manipulation. RJR

516763508-

548. This document is identified as relating to "legal and regulatory responses." Id., p. 508. Reynolds, however, has produced this memo, since it provides a more favorable interpretation of previous (contemporaneous) internal memoranda. Reynolds has not, however, produced other memoranda from 1996 (post-litigation) which relate to this memoranda, including any drafts of this memo or any memos directing the review contained in this memorandum.

285. Defendants also may not justify their claims of privilege over scientific research and information by arguing that it was authored by in-house scientists acting as non-testifying experts. The predicate of this claim, that in-house scientists or employees are somehow experts or consultants for the purposes of litigation, has disturbed many courts and a leading commentator. See Virginia Elec. Pow. Co. v. Sun Shipbuilding, 68 F.P..D.397,405 (E. D. Va. 1975) ("[W]ork performed and the reports made by in-house experts was not the work product of lawyers."); Union Carbide Corp. v. Down Chemical Corp., 619 F. Supp. 1036, 1051 (D. Del. 1985) ("[Factual recitations of technical data and research experiments conducted by Carbide's employees is not work product even if the documents were prepared by or forwarded to Carbide's in-house counsel. . ." ); 8 Wright, Miller & Marcus, Federal Practice and Procedure ß 2033, at 466 (2d ed. 1994) (There "is a legitimate concern that a party may try to immunize its employees who are actors or viewers [in or of the events giving rise to a cause of action against proper discovery by designating them experts retained for work on the case."). Thus, I reject defendants' argument that scientific research documents prepared by defendants' employees are protected by privilege. But for defendants selective designation of employees as "experts," this information would have been discoverable by plaintiffs. Plaintiffs' discovery of scientific information is an appropriate inquiry in this case and should not be defeated by defendants' attempts to deputize members of their

scientific staff as consultants to the legal department.

286. Defendants argue that analyses prepared by company scientists of published scientific literature are privileged. I find, however, that such analyses -- even if prepared by a scientist assisting the legal department -- are not privileged. These documents demonstrate the contemporaneous corporate knowledge of the defendants as to the safety of their products and thus are an appropriate area of discovery by plaintiffs. See Special Master Liggett Report, p. 48; see also Burton v. R.J. P.evnolds Tobacco Co, 170 F.R.D. 481, 488 (D. Kan. 1 997)("Preparation of a review of scientific literature by a scientist assisting the legal department. . . does not cloak the document with work product immunity.").

287. Even if privileged, scientific research and information prepared by non-testifying experts is discoverable upon a showing of "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." A~er v. Jane C. Stormont Hosp., 622 F.2d 496, 502 (10th Cir. 1980);see also Minn. R. Civ. P. 26.02(d)(2). I find that standard is met here. As recognized by Judge Fitzpatrick, a party selling a product has a duty to keep abreast of the hazards posed by its product. See Order of May 9, p. 28. Normally, it is to this body of in-house knowledge (developed in furtherance of a business duty rather than for the purposes of litigation) that a plaintiff would turn to show a manufacturer's underlying knowledge of its product. In similar circumstances in the asbestos litigation, the court in Roesberu v. Johns-Manville Corp., 85 F.R.D. 292, 299 (E.D. Pa. 1980), required the defendant to produce information -- in the hands of non-testifying consultants -- concerning the manufacturer's knowledge of the health hazards of asbestos. Thus, I find that plaintiffs have demonstrated that "exceptional circumstances" exist for production of scientific research and information prepared by defendants' non-testifying experts. This is

especially evident in this case, given the extensive record of defendants utilizing third parties -- as opposed to in-house scientists -- to perform sensitive research.

288. In his order of May 9, 1997 Judge Fitzpatrick found that plaintiffs had made aprima facie showing of crime-fraud with respect to:

C Defendants' assurances that they "would not knowingly distribute a dangerous product" and promises "to solidify such an assurance...." Order of May 9, p. 5.

C Defendants' assurances "that the tobacco industry was committed to providing safe products." j.~, p. 5.

C Defendants' "intentionally den[ying] or minimiz[ingI known health risks.... ~, p. 7.

C Defendants' use of attorneys and/or claims of privilege to suppress information and documents "which appear to be scientific in nature and specifically related to health issues." Id., p. 9.

C Defendants' attempts "to create doubt as to a connection between smoking and illness" and "to create doubt that cigarette smoking causes illness." Id., pp. 9, 10.Defendants' "safety-related" or "health-related" research...." Id., p. 28.

Following the opportunity of the claimant of the privilege to present rebuttal evidence, what the standard of review is to be. In Levin v. C.O.M.B. Co., 469 N.W.2d 512 (Minn. Judge Short wrote:

Yet the record before us shows the trial court did not abuse its discretion by implicitly finding Levin failed to make ~prima facie case of fraud at the motion hearing. Id. at 469 N.W.2d 515, 516.

Judge Short made this observation in reference to the trial court's consideration of affidavits submitted by the plaintiff and testimony submitted by the defendant. Thus, the trial court was making a final determination as to admissability, and not a threshold determination whether an in camera inspection should occur. Thus, the C.O.M.B. decision stands for the proposition that if there is still a prima facie case after defendants have been provided an opportunity to rebut the threshold evidence, the privilege is lost.

290. This does not resolve the problem, however. What is the quantum of proof sufficient to rebut? The C.O.M.B. opinion does not address this question. In their written submissions, Defendants argue that the plaintiffs must carry the burden of proof by a preponderance of the evidence. I accept this pro position. Laser Indus. v. Reliant Technologies, 167 F.P..D. 417, 438 (N. D. Cal. 1996); The American Tobacco Co. et. al. v. The State of Florid4 Case No. 97-1405 at p. 6. (Florida 4th District Court of Appeals, July 23, 1997).

291. In Judge Fitzpatrick's Order of May 9, 1997, he set forth the analytical method to be used in this case:

Assuming that the party asserting the privilege can demonstrate the necessary elements for privilegeto attach, the information may yet be discoverable. The privileges are not absolute. "[Slince the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose." Haines v. Liggett Group. Ine, 975 F.2d 81, 84 (3rd Cir. 1992) (citing with approvaFisher v. United States, 425 U.S. 391,403 (1976)). In this matter, Plaintiffs argue that the privileg~sserted by the Defendants is lost by application of the crime-fraud exception and, therefore, the documents should be made available.

The purpose of the crime-fraud exception to documents otherwise protected by the attorney-client privilege is "to ensure that the seal of secrecy' between lawyer and client does not extend to communications from the *lawyer* to the client made by the *lawyer* for the purpose of giving advice for the commission of a fraud or crime." Haines v. Liggett Groun. Inc, 975 F.2d 81, 90(3rd Cir. 1992) (emphasis in the original). "The advice must relate to future illicit conduct by the client..." Id. This is exactly what the Plaintiffs argue - that counsel for the tobacco industry advised the industry to conceal documents and research harmful to the industry by depositing the documents with counsel, by routing correspondence through the industry counsel, by naming damning research projects as "special projects" purportedly ordered by counsel, etc., to cover potentially dangerous materials under a blanket of attorney-client privilege protection, and Plaintiffs wish to tear this blanket away. The Court, however, does not determine whether the crime or fraud averred has in fact occurred; it does not opine about the merits of the assertions of crime or fraud. It merely examines known facts to determine whether or not the party seeking disclosure has made a *prima facie* showing of crime or fraud. In re A. H. Robins Co.. Inc., 107 F.P..D. 2, 9 (1985). The privilege blanket is torn away if the court finds that the documents in question "bear a close relationship to the client's existing or future scheme to commit a crime or fraud." Robins, 107 F.R.D. at 15, citing In Re Murphy, 560 F.2d 326, 338 (8th Cir. 1977).

In considering whether the crime-fraud exception may be applied to the facts of this case, this Court has made several findings relating to statements made by the Defendants to the public. Collectively, these statements could be characterized as assurances by the industry that it would make an honest attempt to learn whether the smoking of cigarettes created health hazards. The Court also concludes that the Defendants had an independent obligation to conduct research into the safety of its product, and to warn the product's consumers if the research results supported

negative conclusions. A manufacturer has a special duty, apart from litigation, to keep abreast of the hazards posed by its products. See Jenkins v. Raymark Indus. Inc, 109 F.R.D. 269, 278 (E.D. Tex. 1985) affd, 782 F.2d 468 (5th Cir. 1986) Minnesota Civil Jury Instruction Guides, No. 117 ("You are instructed that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field") and No. 119 (duty to warn). The cigarette industry itself has recognized this duty. PM 1000335622. Plaintiffs have presented evidence, and the Court has found, however, that the Defendants have claimed that safety-related scientific research conducted by the Defendants has been the subject of claims of attorney-client privilege.

At the same time, it is indisputable that the Defendants have made public statements intended to minimize or reduce fears that smoking is dangerous to one's health. This Court does not believe that Defendants should be permitted to use in its advertising and public relations campaigns, health-related research which supports their economic interests, and to claim privilege for research which may to lead the opposite conclusion. See Laughlin v. A.H. Robins, Minn. Dist. Ct. No. 776-868 (March 21, 1984). If the Defendants had an obligation to disclose the hazards of tobacco products, and this Court concludes that they did, their obligation to disclose cannot be eliminated by the assertion of attorney-client privilege.

A two-part test is necessary in determining whether the crime-fraud exception applies to the privileged material.

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Haines v. Liggett Group. Inc., 140 F.P..D. 681 (D.N.J. 1992) (citingln re Grand Jurv Investigation, 842 F.2d 1223, 1226(11th Cir. 1987)(citations omitted)), order vacated on other grounds, 975 F.2d 81(3rd Cir. 1992).

The burden of establishing that the crime-fraud exception should apply now falls on the Plaintiffs. The Plaintiffs "bear[] the burden of presenting *a prima facie* case that the crime-fraud exception applies. Levin v. C.O.M.B. Co., 469 N.W. 2D 512, 515 (Minn. Ct. App. 1991). Just what constitutes *a prima facie* case has been expressed by the courts in different words, yet the evidentiary standard is fundamentally the same. The Supreme Court used these words: "To drive the privilege away, there must be something to give colour to the charge;' there must be *prima facie* evidence that it has some foundation in fact.' When the evidence is supplied, the seal of secrecy is broken." Clark v. United States, 289 U.S. 1, 14-15 (1933) (citations and footnote omitted). The Second Circuit phrased it a little differently:

"[The tests] require that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof" In re Grand Jurv Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984).

The evidentiary burden is lessened when disclosure is initially made only to the Court or Special Master for an *in camera* review, because such an inspection is a lesser intrusion into the attorney-client communications than full public disclosure. United States v. Zolii~ 491 U.S. 554, 572 (1989).

Before engaging *mm camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," Caldwell v.

District Court 644 P.2d 26, 33 (Cob. 1982), that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. Id.

Thus, the Court or Special Master may examine the submission of the Plaintiffs and decide whether there is enough factual evidence "to support a good faith belief by a reasonable person that the materials may reveal evidence of a crime or fraud." Haines v. Liggett Group Inc 975 F.2d 81, 96 (3rd cir. 1992). This is only a preliminary step, however. It can result, at best, in an *in camera* review of the challenged document. To determine whether or not the exception applies, the Defendants must "be given an opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege." li at 97. This evidentiary hearing must provide due process, i.e. "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." In re A.H. Robins Co.. Inc., 107 F.P..D. 2, 6 (1985) (citing In Goldberu v. Kelly, 397 U.S. 254, 267 (1970)). The fact finder then will apply the crime-fraud exception only when it "determines that the client communication or attorney work-product in question was *itself* in furtherance of the crime or fraud." In re Richard Roe, 68 F.3d 38, 40 (2nd Cir. 1995).

The court has the discretion whether or not to engage in an *in camera* review and the extent of that *in camera* review.

The decision whether to engage in *in camera* review [should] rest[I in the sound discretion of the [trial court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the [] court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other

available evidence then before the court, will establish that the crime-fraud exception does apply.

United States v. Zolin 491 U.S. 554,572 (1989). It follows, then, that the court must exercise its discretion in light of the factors set forth in Zolin to create a process that balances the need for judicial efficiency with the parties' due process rights. The process set forth herein, infra has been designed to do just that.

292. In their submissions, defendants have urged that I accept a common law definition of "fraud" and require a demonstration by the defendants that each of the elements of common law fraud have been demonstrated and not rebutted. I decline to do so. First, such a requirement would be inconsistent with Judge Fitzpatrick's Order of May 9,1997. Second, the particular facts and allegations of this case cause me to believe that the issue of "fraud" rests at least in part in Minn. Stat. ß 325F.69 which makes it unlawful, at subd. 1 to use "...any fraud, false pretense, false promise, misrepresentation, misleading statement or deception practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has, in fact, been mislead, deceived or damaged thereby..." Thus, the element of actual reliance is eliminated by statute.

293. Additionally, Levin v. C.O.M.B.. Co, 469 N.W.2d 512, 515 (Minn. App. 1991) does not, to my reading, specify that all elements of commons law fraud be demonstrated. Rather, the opinion observes that application of the crime-fraud exception should not be based on a rigid analysis. Instead, the focus should be on whether the detriment to justice from foreclosing inquiry into pertinent facts is outweighed by the benefits to justice from a franker disclosure in the lawyer's office. Id. at 469 N.W.2d 515.

294. The defendants in this case, whether through a

voluntary undertaking embodied by the Frank Statement, or whether by operation of law, were obliged to conduct research into the safety of their products and to warn the product's consumers if the research supported negative conclusions. See Fitzpatrick Order dated May 9,1997.

295. Accordingly, my inquiry in this case is this:

Am I satisfied by a preponderance of the evidence offered by both plaintiffs and defendants that the defendants were engaged in criminal or fraudulent conduct? Included within "criminal or fraudulent conduct" are a failure to conduct appropriate research into the safety of their products and a failure to warn their products' consumers if the research supported negative conclusions.

Second, has it been demonstrated by a preponderance of the evidence that the involvement of defendants' attorneys was in furtherance of the conduct or was closely related to it?

296. In the Special Master Report of September 10, 1997,1 found that the above findings had not been rebutted by defendants, with one exception. That exception related to one aspect of CTR: grant research approved by the CTR Scientific Advisory Board. Special Master Report, at 146.

297. The agreement on the part of all of the U.S. tobacco manufacturers individually to limit or avoid biological research into whether their product causes disease, coupled with defendants ongoing assurances that causation of illness was unproved and speculative, "necessarily implicates the holding of Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991) Is the detriment to justice from foreclosing inquiry into pertinent facts outweighed by the benefits to justice from a franker disclosure in the lawyer's office?" See Special Master Report, at ¶ 146.

298. On the facts of this case, I conclude that further inquiry must be permitted and that plaintiffs in this case must be permitted to inspect documents withheld on claims of privilege which relate to research of the defendants.

299. The defendants in this case, whether through a voluntary undertaking embodied by the Frank Statement, or whether by operation of law, were obliged to conduct research into the safety of their products and to warn the product's consumers if the research supported negative conclusions. Included within criminal or fraudulent conduct' are a failure to conduct appropriate research into the safety of their products and a failure to warn their products' consumers if the research supported negative conclusions.

300. In this round of proceedings, both plaintiffs and defendants proffered evidence regarding nicotine addiction and nicotine manipulation. This evidence included defendants' public statements concerning addiction, as well as defendants' internal knowledge of the properties of nicotine and defendants' conduct with respect to the design of cigarettes.

301. Regardless of whether nicotine is "addictive" or "habit forming," the overwhelming evidence supports the fact that the nicotine in cigarettes makes it more difficult for many people to quit smoking. Given the health risks of continued smoking, at least amounting to strong statistical correlation, this clearly links nicotine to health and safety issues in this case.

302. Thus, I conclude that this evidence concerning nicotine and addiction is related to Judge Fitzpatrick's findings regarding defendants' assurances that they "would not knowingly distribute a dangerous product" and promises "to solidify such an assurance. . . ."; defendants' assurances "that the tobacco industry was committed to providing safe products"; defendants' "intentionally den jlying] or minimiz[ing] known health risks. .. ."; defendants'

use of attorneys and/or claims of privilege to suppress information and documents "which appear to be scientific in nature and specifically related to health issues;" defendants' attempts "to create doubt as to a connection between smoking and illness," and defendants' "health-related" research. Order of May 9, pp. 5, 9, 10 and 28.

303. With respect to tobacco industry public statements denying that smoking or nicotine is addictive, defendants argue that the industry was merely participating in the public scientific debate over the definition of addiction. Accordingly, defendants maintain, since scientific opinion regarding addiction has evolved over the past decades, defendants' public statements cannot be the basis of a crime-fraud finding.

304. I find that, for the purposes of the crime-fraud exception, the issue is not the public debate over the definition of addiction, but rather the internal knowledge of the defendants regarding this issue. I find that the foregoing documents reasonably lead to the conclusion that the defendants internally discussed the addictive qualities (or arguably addictive qualities) of smoking while at the same they intentionally denied or minimized this health risk to the public.

305. In addition, for purposes of the crime-fraud exception, the issue is not the definition of the term "addiction." Instead, the issue is the difficulty of quitting smoking. As the federal magistrate stated in Burton v. R.J. Reynolds Tobacco Co., No. 94-2202-JWL (Aug. 14, 1997), in denying Reynolds' motion for reconsideration of a prior order overruling Reynolds' claims of privilege:

The court also notes RJR's argument that the minutes make reference to "habituation" rather than "addiction" and, therefore, concludes the court erred in its finding that the document may provide evidence of knowledge that nicotine may be addictive.... The court believes that the dispute

concerning the use of these terms is not a controlling issue for discovery purposes. Practically, the terms "habituation" and "addiction" are similar concepts. The use of the term "habituation" may be evidence of knowledge of "addiction," dependent upon the context and the protocols of RIP..

Id at9

306. The failure of defendants to report their internal research on addiction (or habituation) and nicotine manipulation to the public, coupled with their ongoing assurances that addiction was unproved and speculative, necessarily implicates the holding of Levin, supra. On the facts of this case, I conclude that further inquiry must be permitted and that plaintiffs in this case must be permitted to inspect documents withheld on claims of privilege which relate nicotine addiction and manipulation (even if such documents are privileged in the first instance.)

307. 1 note that many of the defendants have withdrawn claims of privilege over documents randomly selected by me and/or selected by plaintiffs form camera review. For example, Philip Morris has withdrawn claims of privilege for 38 documents selected by me and/or plaintiffs. See CLAD #15 69. Reynolds, CTR, BAT Industries, BATCo and TI have made similar withdrawals of claims of privilege. In light the number of privilege claims withdrawn, I am concerned that defendants have over-designated documents as privileged. Moreover, if I were to remove these documents from the in camera review process, the integrity of the entire category procedure could be undermined. As a result, I have considered these documents in the category-by-category determination of privilege.

308. In the Findings above, I have commented upon the Defendants' claims of joint privilege and joint defense. The extensive evidence I have reviewed persuades me that the attorneys for the Defendants, whether representing individual manufacturers or industry representatives, acted

jointly in defense of the entire industry. I am unaware of any industry which has faced such continuing legal pressures on so many fronts, and it is understandable that the tobacco industries attorneys would unite against common external threats. It is also my conclusion that this union resulted in the attorneys' control over the aspects of the tobacco business which might be the subjects of litigation. The presentation of the parties, and the documents I have reviewed, cause me to conclude that the attorneys directed the acquisition and control of information relating to smoking and health.

309. Based upon the above findings of fact and conclusions of law, review of the submissions of the parties, and the extensive hearings and proceedings, I am making a number of recommendations. These recommendations also are based upon my extensive in camera review of the documents themselves.

310. In my review of documents, I have determined that the documents share sufficient common characteristics and criteria to allow determination of privilege on the basis of categories and/or characteristics. The categories and/or characteristics of the documents, as described below, warrant production to plaintiffs as follows:

**CATEGORY I**

311. Category 1 consists of two types of documents: those for which any previous claim of privilege by defendants has been denied by other courts, and documents specifically selected by plaintiffs in this action.

312. Defendants were required to designate into Category 1 all documents found by other courts to lack privilege. Every court that has reviewed defendants' documents in camera has concluded that at least some of the documents are not privileged or are subject to disclosure under the crime-fraud exception. Courts have denied

defendants' claims of privilege over the following types of documents:

C Attorney communications regarding scientific research.

C Documents regarding defendants' knowledge of the addictiveness or habituating nature of nicotine.

C Documents regarding suppression of the true health risks of cigarettes.

C B&W's so-called "Merrell Williams" documents.

C Documents regarding the tobacco industry's "youth programs."

C A document regarding Reynolds' abrupt termination of its smoking and health research.

313. During the Liggett round, I made the following findings regarding the Liggett documents for which a claim of privilege had been previously denied by another court:

C "To the extent that these documents reflect attorneys selecting and directing research projects, and to the extent that the documents represent information as to the corporate knowledge' of the defendants at relevant times,I am of the opinion that the documents should not be privileged in the first place If corporate research directors had selected and directed research on safety issues, the documents generated during the decision making process would have been discoverable." Special Master Report, at pp. 48-49 (emphasis added).

C "These documents are subject to the crime-fraud exception because they demonstrate the actual involvement of the attorneys for the defendant

companies in the selection, funding, and funding continuation for CTR Special Projects, and because these documents provide relevant evidence of the response by the defendants to allegations from external sources to the effect that the defendants' products were unsafe" Id p. 49 (emphasis added).

314. As with the Liggett documents, I find that documents placed in category 1 by the nonLiggett defendants are not privileged and/or closely-related to the crime/fraud findings in this litigation.

315. There are three documents from Category 1 which were selected at random, and which strongly reinforce my factual conclusion that Defendants have failed to rebut the prima facia case of crime fraud.

a. BAT Industries Document 202221955-1961. This is a letter dated August 20, 1970 from David Hardy of the Shook Hardy law firm to DeBaun Bryant, general counsel for Brown & Williamson Tobacco Corporation. In this letter, Mr. Hardy discusses the legal relationship between the British-American Tobacco Company and Brown & Williamson and the recent dismissal of BAT from an Illinois case.

This correspondence is plainly a warning letter to Mr. Bryant in which Mr. Hardy, an attorney for the entire industry, alerts Mr. Bryant, general counsel for an individual tobacco company, to the dangers of the open discussion by scientists of possible health risks caused by smoking. Mr. Hardy writes: It is our opinion that statements such as the above true., statements discussing smoking risks] constitute a real threat to the continued success in the defense of smoking and health litigation. Of course, we would make every effort to "explain" such statements if we were to be confronted with them during a trial, but I seriously doubt that the average juror would follow or accept the subtle distinctions and explanations that we would be forced to urge.

In this correspondence, Mr. Hardy is warning against any such suggestions by industry researchers that cigarettes might cause adverse health effects. This inference is consistent with the proposition that industry attorneys manipulated or attempted to manipulate industry science.

b. BAT Industries Document 202347085-086. This document, from the privilege log, was prepared by N. Cannar, counsel for BAT Co. relates to document retention and research. The document itself reflects that it is an agenda, presumably for a meeting. The document raises several troubling points of discussion:

Information Required.

1. Identification of documents currently sent off-shore by Group companies with research centers.

2. Identification of each company's "research mission." Should this be defined by reference to its current research programme? How can this be defined to include research material from overseas which is useful and uncontroversial whilst excluding material which is irrelevant to the receiving company's research activity and may have health sensitivity.

Issues/Proposals.

1. Restrict current flow of research related documents by:
2. Improve quality of documents by

b. Regular lawyer reviews and audits of scientific documents produced in each company.

c. BAT Co. Document 503 100993-997. This document is not identified as to author or recipient. It is identified asa draft of March 24, 1986, and entitled "Note for the Tobacco Strategy Review Team, Tobacco Research in the B.A.T. Industries Group." The document appears to reflect a

consensus of the members of the group, whether reached at a meeting, or through other communication.

• Among the observations in the document are:

Brown & Williamson now believe that for legal reasons, parts of the Group Research Programme are not acceptable. On the other hand, BAT Co. believe that the Programme reflects a responsible commercial attitude which takes due account of legal obligations. BAT Industries as been asked for a ruling.

• Brown & Williamson's position with respect to product research is said to be:

Product modification work where there is no current identified consumer demand or regularatory requirement is not desirable, i.e., there should be no anticipation of future trends in these areas. This would rule out e.g. Project Rio.. .which involves researching products with lower levels of biological activity...

•On the subject of smoking and health, the document states:

Brown & Williamson are opposed to any research which has any relevance to the smoking and health issue other than providing financial support if this is thought necessary to broadly based external research programmes...

316. Each of the documents discussed in the previous Findings goes directly to the control or suppression of research, and the creation of privilege shields to conceal possession of dangerous information. BAT Industries Document 202221955 is particularly disturbing because it was written by a member of the firm which has for decades represented the tobacco industry.

317. Pursuant to the Order Setting Forth Document

Categories for Determination of Privilege Claims, plaintiffs had the option of designating documents for consideration in subject matter Category 1. ~ Order of May 22 at ¶ 1 ("all documents specifically designated by plaintiffs by Bates numbers"). Accordingly, plaintiffs designated 365 privilege documents -- which are identified in Plaintiffs' Memorandum of Law in Opposition to the Non-Liggett Defendants' Claims of Privilege, dated September 29, 1997, and listed in their Appendix A thereto -- as category 1 documents. I reviewed in camera each document designated by plaintiffs. I find that the documents selected by plaintiffs are (1) not privileged because they involve safety-related scientific research and/or (2) are closely related to the areas of crime-fraud set forth in Judge Fitzpatrick's May 9 Order. See Order of May 9, pp. 5, 7, 9, 10 and 28;see also Special Master Report, pp. 39-48.

**CATEGORY II**

318. The documents contained in Category 2 address a wide variety of subject matters. However, the documents within Category 2 demonstrate that although these documents do not show any evidence, on their face, that they were written or received by an attorney, they are primarily legal in nature.

319. When individual documents are analyzed for their content, it is clear that they contain confidential communications and legal advice, including mental impressions and legal conclusions by counsel. In many instances, documents falling within Category 2 contain legal advice that is recorded in a document authored by non-attorneys that may remain in his own files or that may be sent, on a confidential basis, to other non-attorneys. (See, e.g., Philip Morris document 2021644413, a memorandum from a Philip Morris employee to a Philip Morris employee recording and relaying a privileged attorney-client communication between the employee and two Philip Morris counsel, Holtzman and Katz, containing protected

opinion work product of counsel.)

320. When individual documents are analyzed in conjunction with other surrounding or contemporaneous documents, it is apparent that Category 2 documents are a part of a series of privileged communications, making all documents within the series privileged. (See, e.g., Lorillard document 03748448, a draft position paper authored by Shinn, counsel for certain members of the joint defense, sent via a separate privileged cover memorandum, 03748745/8746, to general counsel for review and comment).

321. Many documents falling within Category 2 contain information that is scientific in nature. (See Philip Morris document 2021644413.) However, when individual documents are analyzed for content and in conjunction with surrounding, contemporaneous documents, it is clear that many of these documents were authored by non-attorneys at the request of attorneys in order to furnish the attorneys with the technical, scientific information necessary to provide legal advice concerning litigation, regulatory and legislative proceedings. As such, these documents contain privileged communications protected from disclosure by attorney-client privilege and work product and joint defense/common interest doctrines.

322. A document need not be authored by or received by an attorney to be protected from disclosure by the attorney-client privilege and/or the work product and joint defense/common interest doctrines. Documents prepared by non-attorneys at the direction of or request of counsel are protected from disclosure by the work product doctrine. Documents that are not authored by or received by attorneys that nonetheless record or confidentially transmit attorney-client communications for the purpose of obtaining or relaying legal advice are protected from disclosure by the attorney-client privilege, or the work product and/or joint defense/common interest doctrines. Carter v. Cornell Univ., 183 F.P..D. 92, 94 (S.D. N.Y. 1997)Ford Motor Co. v. Leggat,

904 S.W.2d 643, 648 (Tex. 1995);United States v. Nobles, 422 U.S. 225, 238-39 (1975):United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1 988)Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 445 (S.D. N.Y. 1990).

323. Documents that, on their face, show no evidence that they were authored by or received by attorneys are nonetheless protected from disclosure by the attorney-client privilege and the joint defense/common interest and work product doctrines when analyzed for their content, which reflects mental impressions, advice and opinions of counsel and when analyzed in conjunction with surrounding, contemporaneous documents, which clearly demonstrate attorney-involvement in the preparation of the document. See e.g., Bituminous Cas. Core. v. Tonka Corp., 140 F.R.D. 381, 388 (D. Minn. 1992).

324. The documents within this category which were reviewed, although they do not identify an attorney as the author or recipient, are primarily legal in nature, and it is a reasonable inference that they constitute legal advice or legal work product.

325. After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 2. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 2 contain any evidence of criminal or fraudulent behavior on the part of defendants or that the documents designated to Category 2 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1 991)In re Richard Roe. Inc., 68 F.3d 38, 40 (2d Cir. 1995);In re Grand Jurv Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Category 2 documents, and they remain protected from disclosure by the attorney-client privilege, the joint

defense/common interest and/or work product doctrines.

326. Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category 2. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Centei 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn. R. Civ. P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"); see also, Ossenfort v. Associated Milk Producers. Inc., 254 N.W. 2d 672, 68 1-82 (Minn. 1977); Minn. P. Civ. P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller Federal Practice and Procedure: Federal Rules of Civil Procedure ß 2032 n. 18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

327. Plaintiffs have failed to demonstrate that the documents falling within Category 2 were created in furtherance of a crime or fraud and are closely related to a crime or fraud. Levin v. C.O.M.B. Co.,, 469 N.W. 2d 512, 515 (Minn. App. 1991)In re Richard Roe, 68 F.3d 38,40 (2d Cir. 1995); In re Grand Jurv Investigation, 842 F.2d 1223, 1226

(11th Cir. 1987). Therefore, the crime-fraud exception does not apply to the documents designated to Category 2.

**CATEGORY III**

328. My previous report concluded that category 3 documents, scientific research on smoking and health, are discoverable:

> [The category 3 documents] do not demonstrate a process of a client seeking advice or an attorney providing advice. On the contrary [the documents] reflect the involvement of the Liggett attorneys in the monitoring of that company's research function.

Special Master Report, p. 51.

329. The determination that scientific research or information on smoking and health is not privileged is mandated by Judge Fitzpatrick's May 9, 1997 order:

> The Court also concludes that the Defendants had an independent obligation to conduct research into the safety of its product, and to warn the product's consumers if the research results supported negative conclusions. [citing Jenkins v. Raymark Indus. Inc., 109 F.R.D. 269,278 (E.D. Tex.),~fi7~j, 782 F.2d 468 (5th Cir. 1986) and Minnesota Civil Jury Instruction Guides, No. 117 and 119].
>
> Plaintiffs have presented evidence, and this Court has found, however, that the Defendants have claimed safety-related scientific research conducted by the Defendants has been the subject of claims of attorney-client privilege. [T]his Court does not believe that Defendants should be permitted to use in its advertising and public relations campaigns, health-related research which supports their economic interests, and to claim privilege for research which may lead to the opposite conclusion. Order of May 9, p. 28.

330. Accordingly, these previous orders and my findings herein require that the non Liggett defendants' category 3 documents be produced.

331. Category 3 documents randomly selected and reviewed by me reveal that defendants are claiming privilege over scientific research and information:

C "Confidential report prepared by American researcher... regarding University of Kentucky - Tobacco and Health Workshop." AM 00024684(*).

C "Draft report summarizing information re tobacco leaf composition." BATCO 400863213~31(*).

C "Confidential communication from B&W Management to B&W counsel. regarding industry-funded research." B&W 6801 44627(*).

C "Transmittal letter with draft description by E.J. Jacob of animal genetics study at Boulder Colorado for review and comment." CTRZN 33612~648(*).

C "Proposed special proiect funding for J. Szepenwol." CTR 1 137181(*).

C "Memorandum. . . regarding funding of research project" PM 1002905373(*).

C "Memorandum from Philip Morris employee to Philip Morris counsel.. .regarding tar content in cigarettes." PM 2024978290(*).

C "Memorandum concerning scientific research from P.R scientist to RJR in-house counsel...." RJR 500020982(*).

C "Memorandum concerning scientific research from RJR scientist. . . ." RJR 500020982(*).

C "Report prepared by RIP. scientists... concerning smoking and health issues... RJR 500887529~3(*).

C "Memorandum concerning smoking and health issues prepared by RJR scientist... RR500284651(*).

C "Handwritten notes concerning scientific research prepared by RJP. scientists....RJR 500295065(*).

C "Memorandum concerning scientists and scientific research prepared by RJR scientist " RJR 500949347~50(*).

C "Letter.. . regarding actions to be taken and legal advice to be sought on carbon monoxide issues." TI 01363 14(*).

332. In addition, plaintiffs have presented evidence that Reynolds has claimed privilege in category 3 over cancer research documents, routine reports of Reynolds R&D department, smoke-inhalation studies, and reports on the health effects of cigarette ingredients:

| Privilege Document Number | Reynolds 4A Index Description of Research |
|---|---|
| 500070739 | Smoking & Health - Lung Cancer |
| 500951825 | Inhalation Bioassay of Cigarette Smoke in Rats |
| 5028 15280 (*) | Lung Cancer - Smoking Studies |
| 50655325 l(*) | Analysis of Asbestiform Fiber Mainstream Smoke of Camel 70 Cigarettes by Structure Probe of Westchester PA: Summary File |
| 500923202 | Effect of Pyridine Compounds on the Biological Activity of Nitrosamines |
| 500284456 | Regarding NO: Varying Quantities of NO were detected in the Smoke of Cigarettes, partially independent of |

| | |
|---|---|
| | the Nitrate Content of the Tobacco |
| 500287132 | Annual Activity Report [of Reynolds' R&D Department] for Year 1968 |
| 501868278 | Smoking Studies Using Dogs - Conducted by Battelle - Columbus Laboratories |
| 500885717 | Quarterly [R&D] Research Report. Science Information Division |
| 500515664 | A Case Control Study of Cancer of the Pancreas |
| 500548873 | Report on Cancerogenic Substances |
| 500967147 | Comparison of the Total Solids and Nicotine Content in Cigarette Smoke of Company and Competitive Brand Cigarettes |
| 501624990 | Question: Is There A Toxic Material Added to a Cigarette? |
| 501857531 | Free Radicals and Health by H.V. Boeing of Spindletop Research, Lexington, Kentucky |
| 500500718 | Critiques on Smoking and Health |
| 504177489 | Nitrosamine Content of Smoke Condensate from Winston Cigarettes |
| 507915907 | Smoke Inhalation Studies |
| 508722588 | 90-Day Inhalation Study in Rats, Using Test and Reference Cigarettes. Study Protocol |
| 502818338 | Comparison of Acrolein Levels in Smoker's Lungs to Levels in Animal Cigarettes |
| 500873262 | Significance of Report of Carcinogenic Activity of Dimethyl Terephthalate |

333. Similarly, plaintiffs presented evidence that Philip Morris listed health-related research performed by some of its key scientists in category 3. Examples include documents written by Helmut Wakeham, director of

research and development, and Thomas Osdene, senior scientist:

C 1960 Wakeham "memorandum . . . regarding funding of scientific proposal on composition of tobacco smoke ." PM 1000328598.

C 1963 Wakeham "memorandum . . . reuardin~ phenol and ciliastasis." PM 1005068824.

C 1963 Wakeham "memorandum.., regarding experimental data concerning phenol." PM 1005068837.

C 1965 Wakeham "memorandum.. . regarding benzopyrene." PM 1005069160.

C 1965 Wakeham "memorandum. . . discussing smoking and health research strategy." PM 1000321857.

C 1968 Wakeham "memorandum . . . regarding pesticide research." PM 1000705999.

C 1969 Wakeham "memorandum. . . regarding smoking behavior research." PM 2022244070.

C 1970 Wakeham "memorandum [to the President of PM].. . discussing smoking and heart disease research." PM 1000321079.

C 1972 Wakeham "memorandum [to the President of PM]. . . regarding smoke inhalation." PM 1005109006.

C 1967 Osdene "memorandum.. .regarding chemical toxicity." PM 1000024441.

C 1979 Osdene "memorandum . . . regarding less hazardous cigarettes." PM 1000122545.

C 1982 Osdene "memorandum . . regarding cigarette additives testing" PM 1000124752.

C 1982 Osdene "memorandum.. . regarding polonium 210." PM 1000083302.

C 1983 Osdene "memorandum.. . regarding tobacco pesticides." PM 1000082472.

334. As with the Liggett documents, all category 3 documents in this round should be produced on the basis that they are not privileged in the first instance, are discoverable under the crime-fraud exception, or are discoverable fact-work product under the necessity exception. At the heart of this lawsuit is the issue of what the Defendants knew and when they knew it. To the extent that fact-work product reflects the state of that knowledge, I conclude it must be disclosed.

335. I also recommend that those documents relating to nicotine identified in Findings 262 through 267 above should be disclosed to Plaintiffs on the basis that they implicate science and health and are not attorney-client privileged in the first instance. If they represent fact work product, Plaintiffs have demonstrated a compelling need for access to them. Plaintiffs have also demonstrated to a degree of unrebutted probability that Defendants were aware of the addictive or habit forming nature of nicotine, that the Defendants experimented with "dosages" of nicotine, and that Defendants did not reveal to the consumers the extent of their knowledge. If there is any privilege to be invoked with respect to these documents, I recommend that it be over-ridden by the crime-fraud exception.

**CATEGORY IV a**

336. With respect to Category 4a, I previously concluded that the Committee of Counsel --the primary

subject of this category -- controlled industry scientific research and that documents which reveal this control are subject to disclosure under the crime-fraud exception:

It is my conclusion, therefore, that with the exception of that research funded by the Scientific Advisory Board, industry research was effectively controlled by the Committee of Counsel.... I also conclude that this attorney-directed control of an industry's research does, in fact, fall within the confines of the crime-fraud exception to the attorney-client privilege.

I conclude that plaintiffs in this case must be permitted to inspect the documents which reveal the control exerted by the tobacco industry attorneys over the research conducted by that industry. Special Master Report, pp. 47-48.

337. Notwithstanding the finding that Committee of Counsel controlled industry scientific research, the Liggett documents reviewed in category 4a did not "represent[] additional evidence supporting an inference of crime-fraud," and were found privileged because they "represent[ed] communication among lawyers as part of a joint defense in response to existing litigation, regulatory action, etc." Id., p. 52.

338. A review of the 4a documents identified in the non-Liggett hearings does not cause me to conclude that the documents in that category are evidence of crime-fraud. As communications of counsel, I recommend that the claim of privilege be sustained.

**CATEGORY IV b**

339. During the Liggett round, I recommended production of all documents in category

4b. I found that CTR Special Projects "functioned entirely under the direction of the Committee of Counsel" and that they "were selected for their favorable prospects." Special

Master Report, p. 47. Thus, the documents in this category were found discoverable under the crime-fraud exception to privilege: Because of my determination that the crime-fraud exception applies with respect to the attorneys' direction of research, I conclude that the documents in Category 4b, if they are attorney-client privileged at all, are subject to the crime-fraud exception. IcL, p. 53.

340. During the Liggett round, I also found that CTR Special Projects were selected by industry lawyers to provide research favorable to the industry for purposes including litigation and public relations:

With respect to the CTR special projects, I conclude that they functioned entirely under the direction of the Committee of Counsel... . I note that the projects were selected for funding by the attorneys on the basis of utility in litigation, congressional testimony, administrative proceedings and for public relation purposes. There is no evidence before me which would cause me to conclude that the CTR special projects were intended to provide research uroduct which might be unfavorable to the tobacco industrv. Rather, the proiects were selected for their favorable prospects.

Special Master Report, at ¶ 142 (emphasis added).

341. I also concluded that the public was not aware of this purpose:

Many of the researchers who worked on CTR special projects published their research. Although these researchers were informed that their publications should bear an acknowledgement that the research was a "Special Project of the Counsel for Tobacco Research," it is unlikely, in my opinion, that any reader other than an industry insider would understand that the research was not, in fact, sponsored by the Scientific Advisory Board. This would result in confusion and a perception that the favorable

research was sponsored by the supposedly neutral SAB. It is my conclusion, therefore, that with the exception of that research funded by the Scientific Advisory Board, industry research was effectively controlled by the Committee of Counsel. It is my further conclusion that the research directed by the attorneys was not intended to be independent; rather, it was intended to be used in opposition to unfavorable research, whether in litigation, legislation, administrative forums, or public relations.

Special Master Report, at ¶¶ 144-45.

342. Defendants contend during this round that these earlier findings on Special Projects were incorrect, insofar as these findings relate to "acknowledgement fraud." Specifically, defendants argue that no fraud occurred because of defendants' failure to distinguish Special Projects research from SAB-funded research. In support of this argument, however, defendants relied on the same affidavits presented during the Liggett round. Moreover, defendants failed to present any evidence to rebut the conclusion that Special Projects were selected by industry lawyers for their favorable prospects, for purposes including public relations. Finally, defendants failed to provide any evidence that -- with the exception of an "acknowledgment" on some Special Projects research publications --that the public was ever informed about the true purpose of this research. Thus, even if the public was aware that this research was not conducted under the auspices of the SAB grant program, the public was never informed that this research was specifically selected by tobacco company attorneys to provide information favorable to the industry's litigation and public relations positions -- i.e., denying or creating doubt about a causal link between smoking and disease. Accordingly, I find the findings from the Liggett proceedings regarding CTR Special Projects stand unrebutted. Furthermore, the additional documents reviewed cause me to reaffirm my previous findings.

343. As with the Liggett documents, the non-Liggett

defendants have grouped in this category documents evidencing lawyer involvement in the selection and funding of special projects:

- C "Confidential communication from American in-house counsel to **RIP.** outside counsel... regarding proposed Special Project research." AM 00024148(*).

- C "Confidential communication from B&W outside counsel... regarding funding of CTR special project research" B&W 293001439(*).

- C Letter from Committee of Counsel member regarding "proposed special project funding for J. Szepenwol." CTR 11327181(*).

- C "Letter from counsel to counsel. . . regarding funding of CTR Special Projects research." LOR 01242547(*).

- C "Report between Philip Morris counsel and joint defense membersregarding funding of CTR Special Project research" PM 2024671237(*).

- C "Memorandum from RIR scientist to RJP. in-house counsel... regarding a smoking and health issue." RIP. 50088 1605(*).

- C "Report prepared by joint industry consultant [Wisconsin Alumni Research Foundation] and sent to joint defense counsel regarding CTR Special Project" PM 1005109186.

344. There is an additional type of document in category 4b. In addition to documents reflecting attorney involvement in CTR Special Projects, the non-Liggett defendants have included documents concerning Lawyers Special Projects or, as it is also known, Special Accounts. See LOP. 943473L16(*) ("Report from joint industry consultant [Domingo Aviado] to Lorillard counsel regarding joint-

industry funded research concerning a literature review pertaining to nicotine").

345. Defendants claim that research reports classified as Special Accounts or Lawyers Special Projects are privileged in their entirety. Transcript, p. 220-224.

346. Production of Lawyers Special Projects research reports is mandated under my finding that "documents represent[ing] information as to the corporate knowledge of the defendants at the relevant times. . . should not be privileged." Special Master Report, p. 48. This finding is consistent with Judge Fitzpatrick's May 9 order that defendants may not selectively claim privilege over safety-related scientific research. Order of May 9, p. 28. Accordingly, all documents grouped in category 4b should be produced.

CATEGORY IV

347. Category 4c consists of documents relating to LS, Inc. and its predecessors.

348. From about 1971 until 1983, CTP. had a Literature Retrieval Division ("LRD").~

Affidavit of Gertenbach ¶ 8, August 8, 1986. LRD, like its predecessor, International Information Incorporated ("3i"), which was not affiliated with CTP., was a computerized information storage and retrieval system. In Camera and Ex Parte Affidavit of Edwin J. Jacob ¶ 108, February 15, 1997."

Recommendations of the Special Master ¶ 112.

349. "The principal purpose of LP.D was to assist outside litigation counsel for the cigarette manufacturers by coding, analyzing and retrieving publicly available, published medical literature, dealing with medical-legal issues arising in cases brought against the tobacco

companies, and for use in preparing to represent their clients in regulatory proceedings and before Congress. Outside litigation counsel specified the materials to be identified, acquired, stored and retrieved, and they directed the manner in which this work was performed. See In Camera and Ex Parte Affidavit of Edwin J. Jacob ¶ 108, February 15, 1997." Recommendations of the Special Master ¶ 113.

350. "In 1983, the functions LRD served were moved to a separate corporation (called LS, Inc.) at another location, where it remains to this day. In Camera and Ex Parte Affidavit of Edwin J. Jacob ¶ 108, February 15, 1997. LS. Inc. and CTP. are unrelated." Recommendations of the Special Master ¶ 116.

351. Philip Morris' Category 4c documents are indistinguishable from the Liggett joint defense documents designated to Category, and as such, represent communications to and/or from lawyers on the subject of work product. See Recommendations of the Special Master at 47.

352. Work product protection applies to documents and other tangible things "prepared in anticipation of litigation or for trial or for another party or by or for that other party's representative (including the other party's ... consultant ... or agent." Minn. P.. Civ. P. 26.02(c)see 4~ Schmitt v. Emery, 2N.W.2d 413, 416 (Minn. 1942) (work product protection extends to materials prepared by any representative of a party).

**CATEGORY V**

353. I found, with regard to the Liggett documents, that communications by attorneys made to formulate or control public statements "do not represent communications made or received as part of the process of seeking or providing legal advice." Special Master Report, pp. 54-55.

354. In the Liggett findings of fact, I also made the following findings regarding defendants' public statements:

- C "Notwithstanding these internal documents, the industry's public relations strategy has been to deny causation and to keep the controversy alive." Special Master Report, at¶36.

- C "Over the years, tobacco industry spokespersons made many comments clearly intended to create doubt as to a connection between smoking and illness." j~, at ¶47.

- C "These types of repeated statements by the tobacco industry denying or diminishing the health effects of smoking were published in Minnesota." Id., at ¶ 58.

- C Defendants did not acknowledge "that there was a statistical association between smoking and disease except as part of a denial of causation." Defendants' public statements "are plainly intended to create doubt as to causation, rather than function as an admission."' Id., at ¶ 127.

355. Judge Fitzpatrick has previously found that industry public statements on smoking and health constituted crime-fraud because they were "intended to create doubt as to a connection between smoking and illness." Order of May 9, pp. 9-10.

356. I find that the non-Liggett defendants have not presented evidence rebutting these earlier findings by me and Judge Fitzpatrick.

357. As they did in the Liggett round of proceedings, defendants argue that defendants' public statements minimizing or denying the health risks of smoking are protected by the First Amendment. The First Amendment, however, does not protect false, deceptive or misleading

statements. Virginia State Bd. of Pharmacvv. Virginia Citizens Consumer Council. mc, 425 U.S. 748, 771-772 (1976). In addition, defendants' public statements -- including TI's statements -- are commercial speech. National Comm'n on E~ Nutrition v. FTC, *570* F.2d 157 (7th Cir. 1977) (trade association advertisements denying existence of relationship between eggs and heart disease were commercial speech not protected by the First Amendment where false and misleading). Finally, under defendants' theory of the First Amendment, the consumer protection statutes of Minnesota would be rendered useless. In Kociemba v. G.D. Searle Co., 707 F. Supp. 1517 (D. Minn. 1979), Judge Renner rejected a similar argument by a pharmaceutical company that public statements regarding the safety of IUD's could not be the basis for liability under Minnesota consumer protection statutes:

[Pharmaceutical salesmen should not have as much leeway in puffing' their wares as would a used care salesman. Id Thus I conclude that the First Amendment is not a bar to disclosure of the documents relating to defendants public statements.

358. Based on an in camera review of the documents randomly selected in this category, I find that many of the documents chronicle attorney involvement in formulation of public statements -- including advertisements, press releases, pamphlets, and publications -- on smoking and health:

C "Draft prepared by counsel of statement to be submitted to Surgeon General re: Cigarette Ingredients." TI 005681 0(*).

C "Legal advice. . . regarding response to questions on cigarette advertising." TI 0326842(*).

C "Confidential draft letter prepared by B&W in-house counsel regarding response to a consumer inciuirv." B&W 785012 135~136(*).

C "Confidential memorandum from B&W outside counsel... regarding a draft BAT report." BATCO 680584000(*).

C "Report of legal advice from J K Wellsre policy statement." BATCO 105363578(*).

C "Draft of statement prepared by Philip Morris counsel regarding Surgeon General's Advisory Committee." PM 10051061 90~200(*).

C "Draft report prepared by counsel setting forth company's position on smoking and health issues and new product development." PM 2021367041(*).

C "Confidential draft press release prepared by industry counsel reflecting industry counsel's opinions and advice regarding smoking and health research" AM 00038853(*).

C "Confidential report prepared by B&W in-house counsel. . . regarding industrv response to smoking and health controversy." B&W 170042567(*).

C "Draft statement on proposed cigarette smoke component regulation, prepared with assistance of CTR's counsel." CTR 1280061 (*).

359. As with the Liggett documents, category 5 documents in this round of privilege determinations are not privileged and -- to the extent they detail formulation of public statements aimed at minimizing or creating doubt about the risks of smoking -- they are subject to discovery pursuant to the crime-fraud exception.

**CATEGORY VI**

360. Documents designated to Category 6 include

several types of documents, including:

a. Documents authored by counsel (outside and in-house) containing legal advice discussing ingredients or additives issues related to ongoing or anticipated litigation, legislative and regulatory proceedings.

b. Documents authored by internal company scientists in response to legal questions posed by counsel on issues regarding ingredients or additives in the context of ongoing or anticipated litigation, legislative and regulatory proceedings.

c. Documents containing legal advice, the request therefor or information to aid in the rendition of legal advice regarding patent issues and in the context of ongoing or anticipated litigation.

361. In the September 10, 1997 Report, I sustained Defendants' privilege claims regarding the Liggett Category 6 documents concluding that the Category 6 documents collectively reflect the involvement by attorneys in responses to regulatory initiatives which relate to cigarette components. I conclude that many of the randomly selected Category 6 documents under consideration in this proceeding similarly reflect confidential legal advice concerning cigarette ingredients issues that arise in litigation, legislative and regulatory proceedings.

362. The documents in Category 6 relating to patent matters contain confidential legal communications between patent counsel and the Defendants' employees or counsel during the process of seeking or enforcing patents.

363. After reviewing the randomly selected documents designated to Category 6, and the Category 6 documents cited in Plaintiffs' brief, and after considering the materials in the record and the arguments of counsel, I conclude that the Category 6 documents are protected by the

attorney-client privilege. Defendants have for many years been subject to regulatory, legislative, and even litigation proceedings concerning the ingredients or additives used in their products. The ingredients documents reviewed in Category 6 reflect legal advice, or information supplied to counsel to assist in the rendition of legal advice.

364. Many documents reviewed in Category 6 contain confidential legal advice relating to joint defense efforts in responding to Congress, the Federal Trade Commission, and the Department of Health and Human Services regarding cigarette ingredients or constituents in cigarette smoke. These documents are protected by the joint defense/common interest privilege.

365. Many documents reviewed in Category 6 also reflect the work product of attorneys, and work product generated at the direction of attorneys, in response to ongoing or anticipated litigation, legislative and regulatory proceedings. These documents are protected work product. Minn. R. Civ. P. Rule 26.02(c).

366. The patent documents reviewed in Category 6 contain confidential legal advice in connection with seeking or defending patents related to, for example, the manufacture of cigarettes or cigarette components. The confidential legal advice within these communications is protected by the attorney-client privilege.

367. After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that Defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 6. In addition, Plaintiffs have failed to demonstrate that Defendants' documents falling within Category 6 contain any evidence of criminal or fraudulent behavior on the part of Defendants' employees or Defendants' counsel, or that Defendants' documents designated to Category 6 were created in

furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe. Inc., 68 F.3d 38, 40 (2d Cir. 1995)In re Grand Jurv Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Defendants' Category 6 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.

368. Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to Defendants regarding the documents in Category

6. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law);Dennie v. Metropolitan Medical Cente 387 N.W.2d401, 406 (Minn. 1986) (same); In re Grand Jurv Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn. R. Civ. P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"); see also Ossenfort v. Associated Milk Producers. Inc., 254 N.W.2d 672, 68 1-82 (Minn. 1977); Minn.R.Civ.P26.02(d)(2) (Minnesota law allows for discovery ofnon-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller..Federal Practice and Procedure: Federal Rules of Civil Procedure

ß 2032 n. 18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct

the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

CATEGORY VII

369. Documents designated to Category 7 primarily contain information relating to industry efforts to discourage underage smoking and to educate cigarette retailers about programs designed to ensure that cigarettes are not sold to underage smokers. Such programs and/or industry efforts include, among others, the Industry Cigarette Advertising Code, the Code of Cigarette Sampling Practices and Tobacco Institute programs "Helping Youth Decide", "Helping Youth Say No", "It's the Law" and "We Card". (See, e.g., Cigarette Advertising Code, PM 000248594-8602 ( J.B. Exh. 256); Cigarette Advertising and Promotion Code, PM 202433 1995-2004 (J.B. Exh.257); TIMNExh. 356; TTMN Exh. 368.)

370. Many documents designated to Category 7 reflect attorneys rendering confidential legal advice to their clients in many fields of law that govern or relate to advertising, marketing or promotion of cigarettes. These documents also contain protected fact and opinion work product. For example, documents in Category 7 address FTC cigarette advertising regulations, sampling regulations and state laws prohibiting sales to minors.

371. Defendants have established that the cigarette market is a "mature" market, with advertising resulting in shifts of consumers among brands. (See, e.g., Lambin J.J. *Advertising, Competition, and Market Conduct,* Oligopoly Over Timg 33-34, 136-138 (1976) (J.B. App. Exh. 763).) Defendants have also presented evidence establishing that cigarette advertising does not entice young people or any other segment of the population to become smokers or to increase the level of consumption of current smokers. (See, e.g., Task Force on Smoking. Smoking and Health in Ontario: A Need

for Balance 104(1982) (J.B. App. Exh. 808); U.S. Department of Health and Human Services. Reducing the Health Consecquences of Smoking: A Report of the Surgeon General 512 (1989) (J.B. Exh. 245).) Furthermore, defendants have presented evidence establishing that family and friends, not cigarette advertising, are the primary influences on smoking by underage people. (See, e.g., Resnick, *M.D Protecting Adolescents from Harm* 278 JAMA 823-832 (1997)Advertising of Tobacco Products: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Ener~v and Commerce, 99th Cong., 1st Sess. 683 (1986) (J.B. App. 705.);Smoking Prevention Act: Hearings on H.P.. 1824 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 53 (1983) (statement of Mortimer B. Lipsett, M.D. ) (J.B. App. Exh. 844); U.S. Department of Health and Human Services, Public Health Service. Recent Trends in Adolescent Smoking. Smoking-Uptake Correlates. And Expectations About the Future 5 (1992) (J.B. App. Exh. 815.)

372. The evidence presented by the plaintiffs to support their claim that defendants purposefully seek to market to underage smokers consists of nine documents from five defendants dating back to 1935.

373. Plaintiffs acknowledged during the course of the hearing that they are not seeking a finding of crime or fraud regarding alleged youth marketing theories. (See Transcript of Hearing, October 15, 1997, p. 126.) Moreover, there is no evidence contained in the documents designated to Category 7 that demonstrates that the tobacco industry marketed to underage persons.

374. Documents designated to Category 7 embody attorney-client communications made for the purpose of requesting or providing confidential legal advice regarding advertising, marketing or promotion issues. These documents also contain protected opinion and fact work

product. Such communications are an appropriate function of counsel and are protected from disclosure by the attorney-client privilege. In re Ford Motor Co., 110 F.3d 954,966 (3d Cir. 1997);United States v. Chen, 99 F.3d 1495, 1501-02 (9th Cir. 1996). Legal advice and work product generated by attorneys while working on advertising legal issues are not suspect and are not subject to special, disfavored, or per se treatment under the law of privilege, as plaintiffs contend, merely because they "involv[e]" advertising. (See ~ 8 Wigmore on Evidence ß 2292, at 554 (McNaughton rev. ed. 1961.) There is nothing "non-legal" about lawyers giving legal advice in the context of their clients' advertising needs, even where the ultimate decisions by the clients are driven "principally by profit and loss, economics, marketing, public relations, or the like... ."In re Ford Motor Co., 110 F.3d 954, 966-968 (3d Cir. 1997).

375. While plaintiffs have informed the defendants and the Court that they are not seeking a crime-fraud ruling with respect to marketing to children, nevertheless, the evidence cited by the plaintiffs is insufficient to establish by a preponderance of the evidence that defendants engaged in a marketing strategy to target underage smokers. Laser Indus. v. Reliant Technologies~ 167 F.R.D. 417, 438 (N.D. Cal. 1996). Moreover, defendants have presented sufficient evidence to rebut plaintiffs' allegations that there is a causal connection between cigarette advertising and underage smoking. (See, e.g., l994Surgeon General's Report, p. 188, (J.B. ETh. 255.) Therefore, as a matter of law, the crime-fraud exception does not apply to documents designated to Category 7.

376. Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category 11. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely

protected under Minnesota law); Dennie v. Metropolitan Medical Center 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn. R. Civ. P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"); see also, Ossenfort v. Associated Milk Producers. Inc., 254 N.W. 2d 672, 68 1-82 (Minn. 1977); Minn. R. Civ. P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller Federal Practice and Procedure: Federal Rules of Civil Procedure ß 2032 n. 18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

**CATEGORY VIII**

377. Documents designated to Category 8 include documents relating to the advertising, marketing or promotion of cigarettes and reflect attorney-client communications regarding responsible, legal advertising and compliance with labeling and health warning notice requirements. These documents also contain material protected by the work product and joint defense/common interest doctrines.

378. Cigarette advertising and marketing are among the most regulated and scrutinized activities in the United States. By law, cigarette advertisement greatly limited in their content, where they can appear, and what must appear

on them. For example, cigarette ads have been banned from broadcast media for more that 25 years, and every cigarette advertisement for the past 25 years has included a health warning notice from the Surgeon General.

379. The documents within Category 8 relate almost exclusively to the industry's response to initiatives by the Federal Trade Commission to create an advertising code and to require disclosures and/or warnings within that advertising. The documents represent the response of the industry lawyers to that FTC initiative.

380. Plaintiffs allege that certain defendants' Category 8 documents constitute business rather than legal advice, because they reflect attorney involvement in advertising campaigns, marketing research and advertising practices and are therefore not privileged.

381. Plaintiffs also allege that the documents designated to Category 8 reflect attorney involvement in advertisements or marketing campaigns regarding the safety of cigarettes.

382. Neither of plaintiffs' allegations are supported by the evidence.

383. The documents contained in Category 8 embody attorney-client communications for the purpose of requesting or providing confidential legal advice regarding advertising issues. Such communications are an appropriate function of counsel and are protected by the attorney-client privilege, the work product and joint defense/common interest doctrines. In re Ford Motor Co., 110 F.3d 954, 966 (3d Cir. 1997)]In re Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997).

384. The test for determining the applicability of the attorney-client privilege is whether the attorney was employed with reference to his knowledge and discretion in the law in order to render confidential legal advice to the

client. United States v. Chen, 99 F.3d 1495, 1501-1502 (9th Cir. 1996). The documents in Category 8 demonstrate that defendants solicited confidential legal advice from counsel based on counsel's knowledge of the law regarding cigarette advertising and marketing. Such confidential legal advice is particularly necessary in defending against legal issues because of the long history of legislation, regulation and ongoing litigation respecting cigarette advertising, marketing and promotion.

385. I conclude that the sample of documents within Category 8 fairly falls within the attorney-client and joint defense privileges. The attorneys were responding to regulatory initiatives which affected the entire industry.

386. After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 8. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 8 contain any evidence of criminal or fraudulent behavior on the part of defendants or that the documents designated to Category 8 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co., 469 N.W.2d 512, 515 (Minn. App. 1991) In re Richard Roe. Inc., 68 F.3d 38, 40 (2d Cir. 1995);In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to the Category 11 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.

387. Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to defendants regarding the documents in Category

8. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law);Dennie v. Metropolitan Medical Center 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn. R. Civ. P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"); see also, Ossenfort v. Associated Milk Producers. Inc., 254 N.W. 2d 672, 68 1-82 (Minn. 1977); Minn. R. Civ. P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller Federal Practice and Procedure: Federal Rules of Civil Procedure ß 2032 n. 18 (exceptional circumstances requirement under non-testifying expert rule is met only if

(1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

**CATEGORY IX**

388. Documents designated to Category 9 contain confidential legal communications concerning discovery issues, including document retention and storage, discussions or drafts of responses to discovery requests, and draft pleadings prepared by or at the direction of counsel for use in pending litigation, legislative and regulatory proceedings.

389. In the September 10,1997 Report regarding the Liggett documents, I concluded that the documents sampled

represent attorneys' consideration of appropriate responses to discovery requests, or requests for information from regulatory agencies and that the documents are subject to the attorney-client and joint defense privileges. Report, September 10, 1997, p.52.

390. After reviewing the randomly selected documents, as well as the documents cited in Plaintiffs' brief, I find no support for Plaintiffs' contention that documents in Category 9 contain any evidence of discovery abuses.

391. Defendants' documents discussing document retention issues are entitled to attorney-client and work product protection. Ziemack v.Centel Corp., No. 92C3 14526, 1995 WL3 14265 at

*7 n.5 (N.D. Ill May 19, 1995);In re Air Crash Disaster Near Chicago. Illinois on May 25. 197990

F.R.D. 613, 618 (N.D. Ill. 1991).

392. Drafts of pleadings, discovery requests, and responses to discovery requests, and analyses of such legal documents, constitute protected work product. Accordingly, many of Defendants' Category 9 documents are protected by the work product and/or joint defense/common interest doctrines. Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp., 125 F.R.D. 578, 591 (N.D.N.Y. 1989);County of Suffolk v. Long Island Lighting Co., 122 F.R.D. 120, 123 (E.D.N.Y. 1988); Natta v. Ziet4 418 F.2d 633, 638 (7th Cir. 1969):Chan v. City of Chicago, 162 F.R.D. 344, 345-46 (N.D. Ill. 1995).

393. After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that Defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 9. In addition, Plaintiffs have failed to demonstrate that Defendants'

documents falling within Category 9 contain any evidence of criminal or fraudulent behavior on the part of Defendants' employees or Defendants' counsel, or that Defendants' documents designated to Category 9 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co, 469 N.W.2d 512, 515 (Minn. App. 1991); In re Richard Roe. Inc., 68 F.3d 38, 40 (2d Cir. 1 995)In re Grand Jurv Investigation, 842 F.2d 1223,1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Defendants' Category 9 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.

394. Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to Defendants regarding the documents in Category

9. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Centei 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn. R. Civ. P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"); see also Ossenfort v. Associated Milk Producers. Inc., 254 N.W.2d672, 681-82 (Minn. 1977); Minn. R. Civ. P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller Federal Practice and Procedure: Federal Rules of Civil Procedure

ß 2032 n. 18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

CATEGORY X

395. Documents designated to Category 10 address a wide variety of regulatory topics including warning labels on cigarette packages and in advertising; tar and nicotine content labels; regulation of smoking in public places; development of cigarettes with reduced ignition propensity; restrictions on and elimination of broadcast advertising; excise taxes; elimination of tax deductions for advertising expenses; vending machine regulations; and jurisdictional issues involving the Food and Drug Administration.

396. The sample of documents from Category 10 represents responses by the attorneys for the industry to regulatory activity by the government. Many of the documents are minutes of the committee of counsel in which responses to the regulatory efforts are considered. Other documents reflect attorneys' involvement in "position papers." In the aggregate, the documents reflect attorney involvement in responding to regulatory activity.

397. In the 1950's, regulatory activities (apart from continuing antitrust scrutiny) affecting the cigarette industry as a whole began to accelerate. Such activities have continued unabated from the 1950's to the present and have occurred on a federal, state, local and international level. These activities have involved a wide variety of federal regulatory agencies including the Federal Trade Commission ("FTC"), the Federal Communications Commission ("FCC"), the Food and Drug Administration ("FDA"), the Civil

Aeronautics Board ("CAB") and the Environmental Protection Agency ("EPA") among others. (See, ~ Defendants' Exhibit 37.)

398. A review of the documents at issue and exhibits submitted by defendants establishes that federal regulatory activities since the 1950's involving the cigarette industry have included disputes between federal regulatory agencies (predominantly the FTC) and the major cigarette manufacturers. These disputes have involved a variety of issues such as cigarette advertising content and placement, broadcast cigarette advertising, the authority of the FTC to issue orders to file special reports and the authority of the FTC to promulgate regulations.

399. Legislative activities on the federal level affecting the cigarette industry began in at least 1957 with the "Blatuik hearings"", which addressed the disclosure of tar and nicotine yields in cigarette advertising. Since 1965, the defendants have monitored proposed legislation raising issues of common interest to the industry and have attended and testified at hearings regarding a wide variety of proposed and existing legislation.

400. Pursuant to their common interests, the defendants shared confidential legal information through counsel to address issues or develop positions in the face of threatened and actual litigation and legislative and regulatory proceedings. The documents show that counsel for the defendants often jointly conferred to analyze state and federal legislation, advised the industry of potential avenues of recourse to proposed legislation or regulatory initiatives, negotiated with agencies with respect to proposed regulations, reported information required by government bodies, ensured compliance with regulations and legislation, avoided or pursued litigation with government agencies, drafted pleadings, and engaged in other traditional lawyer activities on behalf of their clients.

401. The Tobacco Institute often coordinated this joint industry effort. Since its incorporation in 1958, the Tobacco Institute, represented by the law firm of Covington and Burling, has gathered and disseminated statistical and other information concerning the tobacco industry, monitored and reported to the industry tobacco-related legislative and regulatory developments on state and federal levels, represented the industry in Congressional hearings, and lobbied on behalf of the industry. (See, Affidavit of Philip Cohen filed with Defendants' Joint Memorandum and Statements Supporting Joint Defense/Common Interest Privilege Over Liggett Documents, June 2, 1997; Defendants' Open Court Exhibit 37 submitted during the Liggett privilege proceedings, July 15-17,1997.) In-house and outside counsel for the tobacco companies also organized their efforts by participating in a number of committees including the Committee of Counsel, the Ad Hoc Committee, and various committees of "litigation" counsel. These committees monitored and evaluated legal issues of concern to the tobacco industry.

402. In the aggregate, the documents reflect attorney involvement in responding to regulatory activity. I conclude that they are attorney-client and joint defense privileged.

403. The documents falling within Category 10 contain privileged attorney-client communications, relate to the rendering of legal advice and constitute attorney work product in the context of litigation and regulatory and legislative proceedings. ~, Robertson v. Yamaha Motor Corp., 143 F.R.D. 194, 198 (S.D. Ill. 1992)Kent Corp. v. National Labor Relations Bd., 530 F.2d 612, 615, 623 (5th Cir. 1976),cert. denied, 429 U.S. 920 (1976);Levin v. Lear Sieger Diversified Holdings Corp., No. 91 C 1029, 1992 WL 80513 at *2 (N.D. Ill., April 14,1992).

404. The attorney-client communications and work product embodied within the documents designated to Category 10 are protected by the joint defense/common

interest privilege when shared among industry members for the purpose of engaging in a common response to and defense of such matters. In re Auclair, 961 F.2d 65, 69 (5th Cir. 1992)In re Reuents of Univ. of California, 101 F.3d 1386, 1389 (Fed. Cir. 1996)United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).

405. Lawyers are routinely consulted regarding legal issues that might arise during administrative proceedings, and the confidential legal advice given in this regard is protected by the attorney-client privilege. Robertson, 143 F.R.D. at 198. Similarly, materials prepared by lawyers and their agents in anticipation of a governmental agency proceeding qualify as protected work product. See, ~ Kent Corp., 530 F.2d at 615, 623;United States v. Brown, 478 F.2d 1038, 1040 (7th Cir. 1973); Levin, 1992 WL 80513 at *2. The proceeding for which documents are prepared need not actually take place in a court of record, so long as the proceeding is in some sense adversarial. Edna S. Epstein, ABA Litig. Section, The Attorney-Client Privilege and the Work Product Doctrin~ 313 (1977).

406. Lobbying activities before governmental agencies and legislative bodies are protected by the First Amendment. Courts have held that under the Noerr-Pennington doctrine, liability cannot be imposed for "mere attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement." California Motor Transport Co. v. Trucking Unlimite4 404 U.S. 508, 510 (1972). The fact that many of these activities were handled through the Tobacco Institute does not demonstrate fraudulent behavior, as "there is nothing inherently wrong with forming an industry-wide trade association" to represent the views of the industry before a legislative body. Senart v. Mobay Chem. Corn., 597 F. Supp. 502, 506 (D. Minn. 1984). The focus must be narrowed to the purpose of the particular communication or document. To the extent the document deals with a protected activity, it is immune from discovery. In re Burlington Northern. Inc., 822 F.2d 518, 524 (5th Cir.

1987).

407. After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 10. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 10 contain any evidence of criminal or fraudulent behavior on the part of the defendants or that documents designated to Category 10 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co, 469 N.W.2d 512, 515 (Minn. App. 1991)In re Richard Roe. Inc., 68F.3d38, 40 (2d Cir. 1995);In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Category 10 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.

408. Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category

10. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn. R. Civ. P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"); see also, Ossenfort v. Associated Milk Producers. Inc., 254 N.W.

2d 672, 68 1-82 (Minn. 1977); Minn. P. Civ. P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller Federal Practice and Procedure: Federal Rules of Civil Procedure ß 2032 n. 18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

**Category XI**

409. Documents designated to Category 11 address Environmental Protection Agency ("EPA") regulations concerning environmental tobacco smoke ("ETS"), patent application and infringement issues and trademark application and infringement issues.

410. In the 1970's interest developed in the scientific community and the general public regarding the alleged health hazards of ETS. Asserting that ETS posed risks to non-smokers' health, special interest groups lobbied legislators and regulatory agencies for increasingly severe restrictions on smoking in public and work places. The documents falling with Category 11 demonstrate that the tobacco industry relied upon its counsel to monitor legal developments regarding ETS, to provide confidential legal advice regarding the consequences of smoking restrictions and to represent the industry in hearings and regulatory proceedings.

411. Many documents falling within Category 11 contain attorney-client privileged communications and protected attorney work product regarding litigation and regulatory and legislative proceedings. See, Robertson v.

Yamaha Motor Corp., 143 F.R.D. 194, 198 (S.D. Ill. 1992); Kent Corp. v. National Labor Relations Bd, 530 F.2d 612, 615, 623 (5th Cir. 1976)Qert. denied, 429 U.S. 920 (1976);Levin v. Lear Sieger Diversified Holdings Corp. No. 91 C 1029, 1992 WL 80513 at *2 (N.D. Ill., April 14, 1992). Documents containing materials prepared by lawyers and their agents in anticipation of a governmental agency proceeding, such as proceedings before the EPA, are protected work product See ~ Kent Corp. 530 F.2d at 615, 623,cert. denied, 429 U.S. 920 (1976); United States v. Brown, 478 F.2d at 1040;Levin, 1992 WL 80513 at *2.

412. Lobbying activities before governmental agencies and legislative bodies are protected by the First Amendment. Courts have held that under the Noerr-Pennington doctrine, liability cannot be imposed for "mere attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement." California Motor Transport Co. v. Trucking Unlimite4 404 U.S. 508, 510 (1972). The fact that many of these activities were handled through the Tobacco Institute does not demonstrate fraudulent behavior, as "there is nothing inherently wrong with forming an industry-wide trade association" to represent the views of the industry before a legislative body. Senart v. Mobav Chem. Corp., 597 F. Supp. 502, 506 (D. Minn. 1984). The focus must be narrowed to the purpose of the particular communication or document. To the extent the document deals with a protected activity, it is immune from discovery. In re Burlington Northern. Inc., 822 F.2d 518, 524 (5th Cir. 1987).

413. Other documents falling within Category 11 contain attorney-client privileged communications and protected attorney work product regarding patent and trademark issues, including patent and/or trademark infringement matters See ~ Advanced Cardiovascular Systems v. C.R. Bard, 144 F.R.D. 372 (N.D. Cal. 1992)Rohm and Haas Co. v. Brotech Corp., 815 F. Supp. 793 (D. Del. 1993), 19 F.3d41 (Fed. Cir. 1994).

414. After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 11. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 10 contain any evidence of criminal or fraudulent behavior on the part of the defendants or that documents designated to Category 11 were created in furtherance of and are closely related to a crime or fraud. Levin v. C.O.M.B. Co, 469 N.W.2d 512, 515 (Minn. App. 1991 )ln re Richard Roe. Inc., 68 F.3d 38, 40 (2d Cir. 1995);In re Grand Jurv Investigation, 842 F.2d 1223, 1226 (1 lthCir. 1987). Therefore, the crime-fraud exception does not apply to Category 11 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.

415. Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category

11. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law); Dennie v. Metropolitan Medical Center387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jurv Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn. R. Civ. P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"); see also, Ossenfort v. Associated Milk Producers, Inc., 254 N.W. 2d 672, 68 1-82 (Minn. 1977); Minn. R. Civ. P. 26.02(d)(2)

(Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller Federal Practice and Procedure: Federal Rules of Civil Procedure ß 2032 n. 18 (exceptional circumstances requirement under non-testifying expert rule is met only if

(1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

**CATEGORY XII**

416. Documents designated to Category 12 address a wide variety of subject matters, including general litigation matters that do not fall within any other category, such as litigation updates, and legal matters pertaining to the personnel and operations of CTR and TI, such as ERISA, tax, leasing and insurance issues.

417. Documents designated to Category 12 contain attorney-client privileged communications and are protected by the attorney work product and/or joint defense/common interest doctrines.

418. After reviewing the determinations of other jurisdictions, weighing the evidence presented, and considering the arguments of counsel, I find that defendants have rebutted Plaintiffs' prima facie crime-fraud allegations with respect to the documents in Category 12. In addition, Plaintiffs have failed to demonstrate that the documents falling within Category 12 contain any evidence of criminal or fraudulent behavior on the part of the defendants or that documents designated to Category 12 were created in furtherance of and are closely related to a crime or fraud. Leviny. C.O.M.B. Co, 469 N.W.2d 512, 515 (Minn. App.

1991)In re Richard Roe. Inc., 68 F.3d 38, 40 (2dCir. 1995);In re Grand Jurv Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987). Therefore, the crime-fraud exception does not apply to Category 12 documents, and they remain protected from disclosure by the attorney-client privilege, the joint defense/common interest and/or work product doctrines.

419. Plaintiffs have failed to present sufficient evidence demonstrating the applicability of any exception (to the extent they exist) to the attorney-client, the work product and/or joint defense/common interest protection afforded to the defendants regarding the documents in Category

12. Brown v. City of St. Paul Ry., 62 N.W.2d 688, 701 (Minn. 1954) (opinion work product is absolutely protected under Minnesota law);Dennie v. Metropolitan Medical Centei 387 N.W.2d 401, 406 (Minn. 1986) (same); In re Grand Jury Proceedings, 43 F.3d 966, 971 (5th Cir. 1994) (work product protection extends to subsequent litigation); Minn. R. Civ. P. 26.02(c) (to obtain trial preparation materials, the challenging party must show a "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means"); see also, Ossenfort v. Associated Milk Producers. Inc., 254 N.W. 2d 672, 68 1-82 (Minn. 1977); Minn. R. Civ. P. 26.02(d)(2) (Minnesota law allows for discovery of non-testifying expert's facts and opinions only upon a showing of exceptional circumstances); Wright & Miller Federal Practice and Procedure: Federal Rules of Civil Procedure ß 2032 n. 18 (exceptional circumstances requirement under non-testifying expert rule is met only if (1) the party asserting the privilege has "destroyed an item or equipment" necessary for the challenging party to conduct the same sorts of tests conducted by the non-testifying expert, or (2) the number of experts in a particular field is so small that the party asserting the privilege has been able to successfully "monopolize the field").

Dated: February 10,1998.

/s/ Mark W. Gehan Special Master

Supreme Court, U.S.
FILED
JUN 9 2003
OFFICE OF THE CLERK

No. 02-1633

IN THE

# Supreme Court of the United States

MAHER W. SOLIMAN,

*Petitioner*,

*v.*

PHILIP MORRIS U.S.A., INC., ALTRIA GROUP, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T INDUSTRIES P.L.C., LIGGETT GROUP, INC., THE COUNCIL FOR TOBACCO RESEARCH – U.S.A., INC., THE TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50 INCLUSIVE,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF IN OPPOSITION FOR RESPONDENTS PHILIP MORRIS U.S.A., INC., ALTRIA GROUP, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, THE COUNCIL FOR TOBACCO RESEARCH – U.S.A., INC., AND THE TOBACCO INSTITUTE, INC.

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## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are accurately set forth in the petition for a writ of certiorari.

Respondent Philip Morris USA, Inc. (formerly known as Philip Morris Incorporated) has the following parent corporation: Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA's stock.

Respondent Altria Group, Inc. (formerly known as Philip Morris Companies, Inc.) has no parent corporations. No publicly held companies own 10% or more of its stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc. (formerly known as RJR Nabisco, Inc.). R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc. Lorillard, Inc., is the only company that owns 10% or more of Lorillard Tobacco Company's stock. Lorillard, Inc., is a wholly owned subsidiary of Loews Corporation, which has outstanding securities, including Carolina Group stock, a tracking stock, in the hands of the public.

Respondent Brown & Williamson Tobacco Corporation (a successor by merger to The American Tobacco Corporation) has the following parent corporations: British American Tobacco p.l.c. British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent The Council for Tobacco Research – U.S.A., Inc. ("CTR") is a dissolved corporation and has no parent corporations. There are no publicly held companies that own 10% or more of CTR's stock.

Respondent The Tobacco Institute Inc. ("TI") is a dissolved corporation and does not have any parent corporations. There are no publicly held companies owning 10% or more of TI's stock.

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## STATEMENT OF THE CASE

This is a diversity case, and the decisions challenged by petitioner turn exclusively upon state law. Petitioner asserted nine causes of action under California law against the respondent tobacco companies, including claims for fraud and related product-liability theories. The district court dismissed petitioner's action as time barred under California law. Pet. App. F(4). The Ninth Circuit affirmed the order of dismissal on exclusively state law grounds. *Id.* at B.

## REASONS FOR DENYING THE PETITION

The primary question presented – whether the Ninth Circuit applied the correct California statute of limitations – rests exclusively upon state law and was, in any event, correctly decided below. It is therefore inappropriate for review by this Court.

The four additional questions were neither presented to, nor addressed by, the courts below. In addition, none of these questions would merit review even if they had been raised or decided below. Question two (the applicability of California's four-year statute of limitations for "unfair competition" claims) was not raised below and is a pure state law issue. Question three (whether two of the respondents should be considered "manufacturers" or "sellers" of tobacco products) was not raised below and is irrelevant to petitioner's ability to evade the statute of limitations on his claims. Question four (whether the decisions below are consistent with recent federal preemption decisions) is not properly before the Court, because the parties did not address, and the lower courts neither addressed nor decided, whether any of the state law claims raised by petitioner are preempted by federal law. Question five – whether the dismissal

of a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure violates the constitutional right to a jury trial – raises an issue not supported by law and not raised or decided below. None of these questions merits review by this Court.

## I. PETITIONER'S FIRST QUESTION RAISES SOLELY STATE LAW ISSUES.

The Ninth Circuit affirmed the dismissal of petitioner's state law tort claims, based on California's one-year statute of limitations for all claims for personal injury. Cal. Civ. Proc. § 340(3). Petitioner argued below that his common law claims sounded in fraud and were therefore governed by California's three-year statute of limitations for fraud. The Ninth Circuit held that California Code of Civil Procedure section 340(3) "bars untimely personal injury claims based on defective products regardless of the particular legal theory invoked." Pet. App. B9 (citing cases). Numerous California state and federal cases are in accord.[1]

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1. *See, e.g., Nodine v. Shiley Inc.*, 240 F.3d 1149, 1153 n.2 (9th Cir. 2001) (noting that it is well settled in California that "the applicable statute of limitations for fraudulent concealment claims in personal injury actions is Cal. Civ. Proc. Code § 340(3) (one year), not Cal. Civ. Proc. § 338 (three years)"); *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 530 (9th Cir. 1985) (holding that Cal. Civ. Proc. § 340(3) applies to all claims for personal injury "regardless of the legal theories upon which the action is based"); *Edwards v. Fresno Cmty. Hosp.*, 113 Cal. Rptr. 579, 580 (Ct. App. 1974) (one-year period covers all claims for bodily injuries and all "infringements of personal rights as opposed to property rights"); *Goldrich v. Natural Y Surgical Specialties, Inc.*, 31 Cal. Rptr. 2d 162, 166, 169 (Ct. App. 1994) (applying one-year period to numerous claims for personal injury, including fraud claims).

Petitioner offers no argument supporting review of this question, which turns exclusively upon the applicability of California statutes of limitations to claims brought under California law. Petitioner cites no authority for a view contrary to the conclusion of the courts below. There is no conflict between the Ninth Circuit view and state decisional law, no conflict in the Ninth Circuit, and no conflict between the circuits.

This Court has repeatedly emphasized that it will not review diversity cases that raise only state law issues. *See, e.g., Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001); *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); *see also* Sup. Ct. R. 10 (certiorari "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"). Review of petitioner's first question is therefore not warranted.

## II. PETITIONER'S SECOND QUESTION WAS NOT RAISED BELOW AND RAISES ISSUES SOLELY OF STATE LAW.

Petitioner alleges for the first time before this Court that the Court of Appeals failed to apply the four-year limitations period that California law provides for "unfair competition" claims, under California Business and Professions Code section 17208.[2] Again, this question turns exclusively upon an application of state law.

Petitioner did not make this argument in any form in the lower courts. Petitioner never alleged that his complaint could be construed

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2. The statute of limitations at California Business and Professions Code section 17208 – which petitioner now argues should have been applied to his common law tort causes of action – governs only claims brought under California's unfair competition law, Business and Professions Code section 17200 *et seq*. *See* Pet. at 20 (so stating, and citing cases). Petitioner cites no authority for the application of this statute to the claims asserted in his complaint.

as asserting claims for "unfair competition." Rather, he repeatedly (and properly) characterized his complaint as setting forth nine common law causes of action: "Strict Liability, Negligence, Breach of Express Warranty, Breach of Implied Warranty, Fraud, Intentional Misrepresentation, Conspiracy to Commit Fraud and Misrepresentation, Equitable Relief and Intentional Infliction of Emotional Distress." Pet'r Opening Br. to the Ninth Circuit, at 4. Petitioner never suggested that these or any other claims in his complaint were subject to the four-year limitations period that California law provides for unfair competition claims.

This question is inappropriate for review by this Court because it raises exclusively state law issues. Moreover, the Court has repeatedly emphasized that it will not consider arguments that have not been previously raised by the parties, or passed on by the courts below. *E.g.*, *Demarest v. Manspeaker*, 498 U.S. 184, 189 (1991); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988). Accordingly, review of this question should be denied.

## III. PETITIONER'S THIRD QUESTION WAS NOT RAISED BELOW AND IS IRRELEVANT TO THE LOWER COURTS' DECISIONS.

In his third question, petitioner contends that the Ninth Circuit erred in "failing to recognize" that two defendants named in petitioner's complaint – the Council for Tobacco Research–U.S.A., Inc. ("CTR") and the Tobacco Institute, Inc. ("TI") – "are only trade associations that *do not* manufacture or market tobacco products." Pet. at i (emphasis in original).

Petitioner did not raise this issue below, and it was neither mentioned nor decided by the Ninth Circuit. The question whether certain of the respondents "manufacture" or "sell" cigarettes might be of some relevance to the state law question whether such

respondents could have any liability for petitioner's injuries; but that substantive question is of no relevance to the decisions of the district court and the Ninth Circuit that petitioner's action was not timely filed under California law.

Petitioner provides no explanation or argument as to how this issue can be before the Court, or as to why review would be appropriate. *See* Sup. Ct. R. 14(h) (stating that every petition for a writ of certiorari must contain "[a] direct and concise *argument* amplifying the reasons relied on for allowance of the writ" (emphasis added)).

## IV. PETITIONER'S FOURTH QUESTION WAS NOT RAISED BELOW AND IS IRRELEVANT TO THE DECISIONS BELOW.

Petitioner's fourth question presented is whether the dismissal of his claims conflicts with the decision of this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and the opinion of the California Supreme Court in *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994).

Petitioner did not raise this issue below, and it has no bearing upon the issues decided by the Ninth Circuit. Both *Cipollone* and *Mangini* dealt with the extent to which the Federal Cigarette Labeling and Advertising Act ("FCLAA") preempts certain state law claims. The Ninth Circuit's decision does not address preemption at all, and does not rely upon or conflict with *Cipollone* or *Mangini*. No party below asked the Ninth Circuit to decide whether FCLAA preempted petitioner's claims. Indeed, the dismissal of petitioner's claims on statute of limitations grounds made potential preemption issues moot, thus avoiding even the possibility of a conflict with *Cipollone* or *Mangini*.

## V. PETITIONER'S FIFTH QUESTION WAS NOT RAISED OR CONSIDERED BELOW.

In his final question presented, petitioner argues that resolution of a statute of limitations issue on a 12(b)(6) motion violates the Seventh Amendment right to trial by jury. Not only was this argument not raised or considered below, it has been repeatedly rejected by this Court. *See Ex parte Peterson*, 253 U.S. 300, 310 (1920) ("No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined."). *See also Galloway v. United States*, 319 U.S. 372, 388-93 (1943) (directed verdict does not violate the Seventh Amendment); *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497-98 (1931) (retrial limited to question of damages does not violate the Seventh Amendment); *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 319-21 (1902) (summary judgment does not violate the Seventh Amendment). Were it otherwise, any order of dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) would be unconstitutional.

Petitioner's contention was not presented or preserved below and does not merit review by this Court.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Petitioner,
v.

PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.
Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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14 pp

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## INTRODUCTION

Petitioner received Respondents' reply on June 17th, 2003. Respondents B.A.T. Industries PLC and Liggett Group did not file Opposition to Petitioner's Petition for Certiorari. Contrary to defendants' assertions, plaintiff has repeatedly argued before the District Court as well as the Ninth Circuit that his claims could be construed as asserting claims for "unfair competition" and he repeatedly argued that his claims are covered by California Business and Professions Code Section 17208 for four year statute of limitations. This argument was argued before the District Court as well as the Ninth Circuit. Most specifically in Plaintiff's Opposition to Defendants' Motions for Dismissal as well as Motions to Strike. Plaintiff's claims are not based on injury caused by product but caused by defendants' conduct and the complaint speaks for itself. Also, petitioner has repeatedly argued before the Ninth Circuit as well as the District Court that two of the defendants (Council for Tobacco Research and Tobacco Institute) are only trade associations. These two defendants do not produce, manufacture, design or market any product, therefore the Dismissal of Petitioner's claims by the Ninth Circuit as well as the District Court specifically against these two Defendants on the grounds of he Expiration of Statute of Limitations for injuries caused by defective product is erroneous and it does not stand up to logic nor is it supported by the facts or the law. Respondents are well aware that this ruling by the Ninth Circuit is erroneous and a miscarriage to justice. Furthermore, it is contradicted by this Court's prior decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). Additionally and contrary to Respondents' assertions, all other issues in the petition were argued in the Ninth Circuit as well as the District Court. Respondents are not claiming (nor could they) that Petitioner is unable to prove Fraud and Conspiracy should this case get reversed and proceed to trial. The decision of the Ninth Circuit should not be allowed to stand. It incorrectly suggests that tobacco industry have the right to

avoid liability despite the fact that they engaged in the following conduct:

a. Defendants for many years that nicotine is addictive but have publicly denied both the fact that nicotine is addictive and their knowledge of this fact, in order to conceal the addictive nature of cigarettes from the public, including plaintiff;

b. During the same time defendants have publicly denied the addictive nature of nicotine, defendants have intentionally controlled the level of nicotine and other toxic substances they have sold, in order to preserve the dependence of smokers on cigarettes that defendants sell. To this end, defendants have utilized additives such as ammonia, as well as designs for which defendants have sought patents, to make cigarettes, in effect, a "package" for the delivery of nicotine. Defendants have intentionally sought to "increase the delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes," maintain "the proper amount of nicotine in tobacco smoke," and "deliver a pharmacologically active dose of nicotine to the smoker.";

c. During the same period of time, despite this voluntary and public undertaking to protect the public's "health as a basic responsibility paramount to every other consideration," Defendants have also intentionally avoided researching or developing cigarettes that would not cause dependence or addiction in those who use them;

d. In their efforts to conceal the health hazards of smoking and the addictive nature of nicotine, Defendants have testified falsely under oath before the United States Congress, provided false explanations to customers and governmental entities about the health hazards of tobacco and the harmful qualities of nicotine; concealed their secret research and testing on the dangers of cigarette smoking; [and] concealed their deliberate manipulation of the nicotine levels of cigarettes.

The Ninth Circuit incorrectly suggests that these defendants can only be liable for any defect in their product within timeline of one year Statute of Limitations and cannot be liable for their conduct as outlined above.

Respondents Brief in Opposition to the Petition for Writ of Certiorari demonstrates why the Petition should be granted, because it accurately identifies the crucial issues and illustrates the confusion surrounding the proper standard of review. Because of this confusion in the applicable standard, this Court should directly address the application of the Statute of Limitations to claims that were brought as a result to injuries caused by defendants' conduct and not their product.

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## REASONS FOR GRANTING THE WRIT

### I. THE DISTINCTION BETWEEN CLAIMS THAT ARE PREDICATED ON A DUTY BASED ON SMOKING AND HEALTH AND CLAIMS THAT ARE PREDICATED ON THE DUTY NOT TO DECEIVE IS AN IMPORTANT QUESTION OF FEDERAL LAW

Petitioner asks this Court to articulate the standards that apply to distinguish claims that are not predicated on a duty based on smoking and health but rather on more general obligation.....the duty not to deceive. *Cipollone v. Liggett Group, Inc.* 60 U.S.L.W. 4703, 120 L. Ed. 2d 407, 430. Indeed, Justice Blackmun stated in a concurring opinion, "I can only speculate as to the difficulty lower courts will encounter in attempting to implement the court's decision." *Cipollone v. Liggett Group, Inc.* 60 U.S.L.W. 4703, 120 L. Ed. 2d 407, 439. Apparently, the speculation of Justice Blackmun has been proven true in this case.

This Court should take the opportunity to provide guidance given the difficult nature of the subject and the hard-to-digest *Cipollone* opinion because *Cipollone* is the law in cigarette cases amplified and supported by this Court in *Medtronic, Inc. v. Lohr* (1996) 116 S. Ct. 2240. Furthermore, *Cipollone* holds defendants obligated for the post-1970 advocacy statements because they constitute an "undertaking." One who undertakes to communicate with the public has a duty to do it non-negligently. This principle applies even if the party had no duty to communicate in the first place. *Cipollone* stated that: "[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement....imposed under State law" within the meaning of §5(b). 120 L. Ed. 2d 407, 428.

Defendants' advocacy activities can also be seen as violations of the "duty not to deceive" under *Cipollone*: "Moreover, petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not preempted by §5(b). Such claims are not predicated on a duty based on smoking and health" but rather on a more general obligation - the duty not to deceive. 120 L. Ed. 2d 407, 430.

This Court has ruled on the related issues, but never directly on the issue presented in the present Petition for Certiorari with respect to Statute of Limitations in relation to the conduct of defendants. This case now gives the Court the opportunity to articulate clear standard that applies to claims that are predicated on the duty not to deceive.

## II. THE COURT SHOULD CLARIFY THE DISTINCTION BETWEEN THE PROVINCE OF THE COURT AND THAT OF THE JURY PURSUANT TO THE SEVENTH AMENDMENT OF THE U.S. CONSTITUTION.

Since the question of Statute of Limitations is a

question of fact and not a question of law, and that the complaint alleges equitable relief, the traditional distinction between law and equity for purposes of determining when there was a constitutional right to trial by jury remained and led to some difficulty. Under the old equity rules it had been held that the absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. *Hipp v. Babin*, 60 U.S. (19 How.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid in the federal courts had to be sought in separate proceedings. *Scott v. Neely*, 140 U.S. 106, 109 (1891); *Bennett v. Butterworth*, 52 U.S. (11 How.) 669 (1850); *Lewis v. Cocks*, 90 U.S. (23 Wall.) 466, 470 (1874); *Killian v. Ebbinghaus*, 110 U.S. 568, 573 (1884); *Buzard v. Houston*, 119 U.S. 347, 351 (1886). Where an action at law evoked an equitable counterclaim the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, res judicata and collateral estoppel could operate so as to curtail the litigant's right to a jury finding on factual issues common to both claims. But priority of scheduling was considered to be a matter of discretion. Federal statutes prohibiting courts of the United States from sustaining suits in equity where the remedy was complete at law served to guard the right of trial by jury and were liberally construed. *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94 (1932).

This difficulty has been resolved by stressing the fundamental nature of the jury trial right and protecting it against diminution through resort to equitable principles. In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), the Court held that a district court erred in trying all issues itself in an action in which the plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it, and the defendant had filed a counterclaim alleging violation of the antitrust laws and asking for treble damages. It did not matter, the Court

ruled, that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims. Subsequent jury trial of these issues would probably be precluded by collateral estoppel, hence "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres v. Westover*, (1959) 359 U.S. 500 at 510-511. Then in *Dairy Queen v. Wood*, 369 U.S. 469 (1962), in which the plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried before a jury, because the primary rights being adjudicated were legal in character. Thus, the rule that emerged was that legal claims must be tried before equitable ones and before a jury if the litigant so wished. If legal and equitable claims are joined, and the court erroneously dismisses the legal claims and decides common issues in the equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990).

Respondents' misapplication of the proper test only reinforces the need for this Court to adopt clear standards. It indicates Respondents' efforts to identify and apply a different standard by which to evaluate Petitioner's claims, despite the authority provided in *Cipollone*. This Court should clarify the confusion stated in *Cipollone* and provide such a standard.

## CONCLUSION

The Court should grant this Petition and directly address the application of the Statute of Limitations to claims that were brought as a result to injuries caused by Defendants' conduct (duty not to deceive) and not their

product. Furthermore, the Court should clarify the distinction between the province of the Court and that of the jury pursuant to the Seventh Amendment of the United States Constitution.

Respectfully Submitted,

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NO. 02-1633

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IN THE

Supreme Court of the United States

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MAHER W. SOLIMAN

Petitioner,

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PHILIP MORRIS INCORPORATED ("PHILIP MORRIS U.S.A."), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES PLC, AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., TOBACCO INSTITUTE, INC., AND DOES 6 THROUGH 50, INCLUSIVE.

Respondents.

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**PROOF OF SERVICE**

I, MONICA VOGEL, do swear or declare that on this date, June 20th, 2003, as required by Supreme Court rules of Court, I have served three copies of the enclosed REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be

served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 20th, 2003

_____

MONICA VOGEL